SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. R. BRUCE COZZENS, JR.
Justice.

TRIAL/IAS PART 5
NASSAU COUNTY

JENNA COHEN, an infant under the age of 14 years, by her parent and natural guardian, MARCIE COHEN, and MARCIE COHEN, individually,

Plaintiff(s),

-against-

MOTION #003
INDEX # 2612/2007
MOTION DATE:
December 22, 2010

BEN'S KOSHER DELICATESSEN & RESTAURANT INC., and "JOHN DOE",

Defendant(s).

BEN'S KOSHER DELICATESSEN & RESTAURANT, INC.,

Third-Party Plaintiff,

-against-

ANDREW W. COHEN, an infant under the age of 14 years by his parent and natural guardian, BRIAN COHEN,

Third-Party Defendant,

The following papers read on this motion:

Notice of Motion.....1
Reply Affirmation..... 1
Affirmation in Opposition.....1

Upon the foregoing papers, it is ordered that third- party defendant's motion for summary judgment is determined as hereinafter set forth.

The third -party defendant has moved for summary judgment on the issue of liability pursuant to CPLR §3212 on the ground that there are no triable issues of fact with regard to third-party defendant.

The primary action was filed against defendants Ben's Kosher Delicatessen & Restaurant, Inc (hereinafter Ben's) and John Doe for alleged injuries plaintiff, infant Jenna Cohen (hereinafter Jenna) incurred while patronizing Ben's, located at 59 Old Country Road, Carle Place, NY. While at Ben's, on or about December 2, 2006, defendant John Doe allegedly spilled boiling water upon the infant plaintiff, Jenna, causing her to sustain alleged serious and permanent personal injuries. Depositions were taken of both Jenna and Resul Senturk (hereinafter Senturk), the identified employee waiter that spilled the water on Jenna. After Senturk's deposition, defendant Ben's served a third-party summons and complaint on Andrew Cohen (hereinafter Andrew) alleging "affirmative, active, and primary negligence" on the part of Andrew, who was six-years-old at the time of the incident.

In his motion for summary judgment, third- party defendant argues that to create a question of fact that a six-year-old child is liable for negligence, that third- party plaintiff must demonstrate that Andrew owed the plaintiff or third -party plaintiff a duty; there was a breach of that duty and that third-party defendant's breach of this duty was the proximate cause of the plaintiff's injuries. Movant argues that he owed no duty to the waiter or to Jenna and there is no demonstration via Senturk's affidavit that Andrew owed such duty. Movant also argues that Senturk's affidavit consisted of conclusory statements that do not demonstrate that Andrew was the cause of the tripping. Movant also asserts that Senturk's affidavit was contradictory with Senturk's deposition testimony and contradicted in a way to attempt to create a triable issue of fact. Movant argues that third -party plaintiffs' affidavit from the waiter was an attempt to raise a triable issue of fact with feigned issues.

In his deposition the waiter, Senturk, testified that as he was walking down the center aisle with a tray of hot water and tea bags that he observed Andrew and Jenna at a two-seat booth. He testified that both were not seated, but rather half standing half seated with one knee in the booth. When Senturk was five feet into the aisle, about 15 to 20 seconds later, Andrew got up to walk toward his parents when Andrew's right forearm and elbow came into contact with Senturk and the tea cup spilled onto the saucer, and "everything just went down." In his sworn affidavit, obtained by third -party plaintiffs after the instant motion was made, Senturk indicated that "Andrew Cohen hit me and caused me to trip as I was walking down the aisle of the restaurant and that the "hot water spilled out of the cup…as a direct result of the young boy hitting me and causing me to trip."

In addition to arguing that there is no triable issue of fact, the instant motion to dismiss is made by Andrew, in part, that Andrew is not liable as a matter of law based on his age and status as non sui juris. Andrew argues that a six-year-old patron in a restaurant, acting as a normal six-year-old in the same circumstances, was too young to appreciate the dangers of his surroundings at the time of the alleged incident.

The role of the court on a motion for summary judgment is "not to determine credibility, but whether there exists a factual issue, or if arguably there is a genuine issue of fact " *J. Capelin Associates, Inc. v. Globe Mfg. Corp.*, 34 NY2d 338, 313 NE2d 776, 357 NYS2d 478 (1974). "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact [citations omitted]. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" *Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923, 925, 501 NE2d 572 (1986). Here, the third -party defendant has met its burden and shifted the burden to the third-party plaintiff (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 (1980)).

An opponent to a summary judgment motion may show an acceptable excuse for an inability to produce admissible proof, but, "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." (*Zuckerman*, supra). For an opponent to defeat a motion, it is insufficient to merely raise "feigned" issues of fact (*Capraro v. Staten Is. Univ. Hosp.*, 245 A.D.2d 256, 257; *see Miller v. City of New York,* 214 AD2d 657; *Garvin v. Rosenberg*, 204 AD2d 388).

"[I]nfants under the age of four are conclusively presumed incapable of negligence (citations omitted).... For infants above the age of four, there is no bright line rule, and 'in considering the conduct of an infant in relation to other persons or their property, the infant should be held to a standard of care ... by what is expected of a reasonably prudent child of that age, experience, intelligence and degree of development and capacity' (*Gonzalez v Medina*, 69 AD2d 14, 18 [1st Dept. 1979, citing *Camardo v. New York State Rys*. 247 NY 11 1 [1928]; *see* also *Steves v City of Rochester*, 293 NY 727, 731 [1944] ["The general rule is that 'a child is not guilty of contributory negligence if it has exercised the care which may reasonably be expected of a child of similar age and capacity."']])" *Menagh v. Breitman*, 2010 N.Y. Slip Op. 32892, 2010 WL 4156010 (N.Y. Sup.).

"...[U]nder some circumstances, in the absence of any evidence bearing upon the capacity of a particular child except its age, an inference may be drawn, in the light of common experience, as to the child's ability to apprehend and avoid the danger which resulted in its injury" *Koo v. St. Bernard*, 89 Misc2d 775, 392 NYS2d 815, citing *Stone v. Dry Dock R.R. Co.*, 115 NY 104, 21 NE 712. "'No rule of law fixes an arbitrary age at which a particular degree of care may be expected, or furnishes a true presumption which takes the place of evidence, that a child is not chargeable with contributory negligence. Only where the circumstances admit of only one inference may the court decide as a matter of law what inference shall be drawn'" *Koo v. St. Bernard*, supra, quoting *Camardo v. New York State Railways,* 247 NY 111, 118-119, 159 NE 879, 881.

In the opinion of this Court, the waiter's affidavit has all the appearances of having been tailored to raise triable issues of fact in opposition to third -party defendant's motion, going so

far as to change the nature of the alleged incident and now claim a six-year-old tripped him, causing him to fall and spill hot water on the infant plaintiff. Similar to *Franza v. London Terrace Gardens*, wherein in an attempt to raise triable issues of fact, an affidavit was obtained that contradicted the testimony previously provided under a sworn deposition. The court rejected the feigned issues of fact, as we do here [9 Misc3d 1112(A), 808 NYS2d 917 (Table), 2005 WL 2312497 (NY Sup), 2005 NY Slip Op. 51507(U)].

It is also the opinion of this Court that Andrew, a six-year-old child when the alleged incident occurred, was too young to appreciate the dangers of his surroundings at the time of the incident, and exercised the care which may reasonably be expected of a child of similar age and capacity. Through affidavits submitted by both parties and deposition testimony of both plaintiff, third -party defendant, and by the waiter Senturk, Ben's, at the time of the incident, was a busy restaurant with waiters moving around the restaurant, through aisles, coming in and out doors to the kitchen with trays. Both parties submitted evidence that Andrew was not running around without care of his surroundings and both parties testify that Andrew and plaintiff Jenna were at the booth and that when Andrew moved to walk over to his parent that the contact between Andrew and Senturk occurred. It can be reasonably inferred that as a matter of law that third- party defendant, Andrew, acted as a reasonable and prudent six year old in the same situation and therefore is not liable.

Therefore the third- party defendant's motion for summary judgment to dismiss the complaint is granted.

The foregoing constitutes the Court's Decision and Order.

Dated: MAR 29 2011

J.S.C.

ENTERED
APR 01 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE