Amchin v Lone Star Steakhouse
2011 NY Slip Op 31413(U)
May 25, 2011
Sup Ct, NY County
Docket Number: 101307/09
Judge: Eileen A. Rakower
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SCANNED ON 5/31/2011

[* 1]

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

PRESENT: HON. EILEEN A. RAKOWER PART 15

Index Number : 101307/2009

AMCHIN, DUSHAN

VS

LONE STAR STEAKHOUSE

Sequence Number : 004

SUMMARY JUDGMENT

INDEX NO. ____

MOTION DATE ____

MOTION SEQ. NO. ____

MOTION CAL. NO. ____

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits ____	2
Replying Affidavits ____	3
	4

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

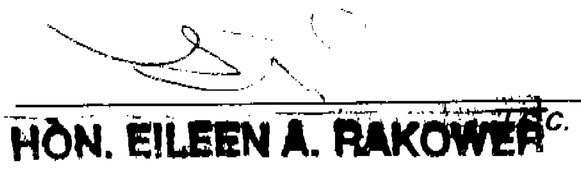
FILED

MAY 31 2011

NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 5-31-11



HON. EILEEN A. RAKOWER J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

---X

DUSHAN AMCHIN,

Plaintiffs,

- against -

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

Defendants.

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Index No. 101307/09

DECISION and ORDER

Mot. Seq. 004

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HON. EILEEN A. RAKOWER

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 at around noon. Defendants now move for summary judgment pursuant to CPLR §3212. Plaintiff opposes the motion, and cross-moves for summary judgment.

According to Plaintiff's deposition testimony, Plaintiff entered the restaurant with Timothy Ryan, a potential business client, through the restaurant's entrance at 49th Street. They approached the hostess desk, where the hostess began escorting Plaintiff and Ryan to their table. Plaintiff followed behind the host, and Ryan was behind Plaintiff. They walked alongside an "L-shaped" bar and then turned left and proceeded toward their table. Plaintiff states that the hostess took them through a "narrow" space where the tables "were so close to each other that [they] had to zigzag through" and "there was no room for two people to fit by." As they proceeded through this area, a waiter headed towards them in the opposite direction, carrying dirty dishes in his hand. Plaintiff states that she "had to get out of the waiter's way so he could pass by," and turned her body to the left in order to let him pass. She stood still for a few seconds to let the waiter pass. Plaintiff did not come into contact with either the waiter or the dishes. She then turned to the right and started walking again

when she slipped and fell to the floor. She testified that the floor was "very slippery" and "very shiny. It looked like it was freshly waxed." Plaintiff did not observe any wet condition in proximity to the area where she slipped, nor did she observe any food, debris, or wax buildup - "[j]ust that very shiny floor there."

Defendants argue that they are entitled to summary judgment because, contrary to Plaintiff's allegations of a dangerously crowded restaurant, Plaintiff was able to move to a safe position as the waiter passed. They further argue that liability for Plaintiff's fall cannot attach based upon a slippery floor as a result of waxing in the absence of a foreign substance or negligent application of the wax. In addition, Defendants claim that the allegedly narrow passageway did not cause Plaintiff's injuries.

In Plaintiff's attorney's affirmation in opposition, Plaintiff states that the narrow space created by expanding the leaves of tables, coupled with the oncoming waiter, "forc[ed] plaintiff to curl into an awkward position to avoid collision with the busboy/waiter." The attorney's affirmation further describes Plaintiff as having been forced to "lean out of the way to avoid contact" with the waiter. Plaintiff also submits the affidavit of Maria R. Mendoza, an interior designer. Mendoza states that she performed an on-site inspection of the restaurant on August 26, 2010. In the location where Plaintiff fell,[1] Mendoza states 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 ...."[2]

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

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[1]Defendants contend that the location of the restaurant examined by Mendoza was not the location of Plaintiff's accident. They further call into question her status as an expert.

[2]The court notes that the National Fire Protection Association provision cited by Plaintiff deals with aisle and table spacing for ensuring safe egress from the area, ostensibly in the event of a fire or similar emergency situation, in which large numbers of people need to exit the affected area. Such concerns are not raised in this lawsuit.

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]).

It is well settled that, where a plaintiff alleges negligence stemming from overcrowding, the plaintiff must demonstrate that she was unable to find a place of safety or her freedom of movement was restricted by the overcrowding conditions (*see Benanti v. Port Auth. of N.Y. and N.J.*, 176 A.D.2d 549 [1st Dept. 1991]). Here, Plaintiff's own testimony establishes that, in the location where Plaintiff fell, she was able to step aside to allow the waiter to pass without coming into contact with either the waiter or the dishes he was carrying. While Plaintiff's attorney characterizes Plaintiff's fall as the result of Plaintiff being forced to "curl[]" and "lean" out of the path of the oncoming waiter, these statements have no support in the record[3], and are in fact contradicted by Plaintiff's deposition testimony, where Plaintiff describes herself as "turn[ing] [her] body to the left," and "standing still" for "a couple of seconds for the waiter to pass by." Plaintiff testified that, after the waiter passed, she "took a step with [her] ... right leg," turning back to the right, and "[t]hen took a step with [her] left and then ... was going to take another step with [her] right foot and ... slipped." Plaintiff's own deposition testimony makes clear that she was able to find a place of safety to allow the waiter to pass without incident, and it is well settled that Plaintiff's self-serving attorney's affirmation, written by an individual lacking firsthand knowledge of the incident, is insufficient to defeat Defendant's motion for summary judgement (*see Jospeh v. Pitkin Carpet, Inc.*, 2007 NY Slip Op 7765, *2 [1st Dept. 2007]).

As for the slippery floor, it is equally settled that "the fact that a floor is slippery by reason of its smoothness or polish, in the absence of any proof of the negligent application of wax or polish, does not give rise to a cause of action, or an

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[3]In fact, the word index of Plaintiff's deposition shows that neither "lean", nor "curl", nor any variations of the words appear even once throughout Plaintiff's deposition testimony.

inference of negligence" (*Pagan v. Local 23-25 Int'l Ladies Garment Workers Union*, 234 A.D.2d 37, 38 [1st Dept. 1996]). Here, the court has searched the record, and it contains no evidence that the surface where Plaintiff slipped was wet, contained discarded food, debris, a buildup of wax, or any other hazards. Nor does the record contain any evidence of the negligent application of wax. To the contrary, the deposition testimony of Scott Gould, general manager of the restaurant, establishes 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 before any patrons arrive in the restaurant (Plaintiff's accident occurred on a Wednesday afternoon).

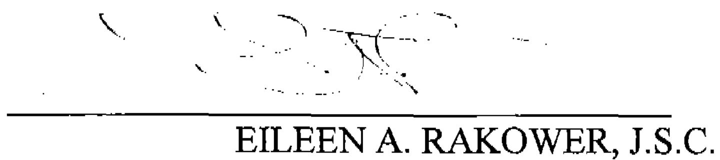
Wherefore it is hereby

ORDERED that Defendants' motion for summary judgment is granted; and it is further

ORDERED that Plaintiff's cross-motion is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

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



DATED: May 25, 2011

EILEEN A. RAKOWER, J.S.C.

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