

Solis v McDonald's Corp.

2011 NY Slip Op 31863(U)

July 7, 2011

Supreme Court, New York County

Docket Number: 104972/2009

Judge: Judith J. Gische

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. JUDITH J. GISCHE
J.S.C.

PART 10

Index Number : 104972/2009
SOLIS, LUIS
vs.
MCDONALD'S
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

*motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.*

FILED

JUL 11 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/7/11

HON. JUDITH J. GISCHE J.S.C.
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 : IAS PART 10

-----X

LUIS SOLIS,

Plaintiff,

- against -

MCDONALD'S CORPORATION,
MCDONALD'S FRANCHISE and
BRUCE C Ltd. PARTNERSHIP,

Defendants.

-----X

Decision/Order

Index No. 104972/09
Seq. No. 004

Present:

Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers
considered in the review of this (these) motion(s):

Papers	Numbered
McDonald's Corp's n/m (CPLR 3211, 3212) w/ADF affirm, exhs	1
Pltfs' opp w/RSG affirm, exhs	2
McDonald's Corp's reply w/ADF affirm, exhs	3

Upon the foregoing papers, the decision and order of the

FILED

court is as follows:

JUL 11 2011

HON. JUDITH GISCHE, J.:

NEW YORK
COUNTY CLERK'S OFFICE

In this personal injury action, defendant McDonald's Corporation ("McDonald's Corp."), also sued herein as McDonald's Franchise, moves, pursuant to CPLR 3211 or 3212, to dismiss the Complaint and any cross claims against it.

BACKGROUND

Plaintiff, Luis Solis, commenced this action seeking to recover damages for personal injuries he sustained when he slipped and fell due to a slippery condition on the staircase inside the 181st Street entrance to the McDonald's restaurant located at 4259 Broadway, New York, New York (the "subject

premises"). Defendant Bruce C Ltd. Partnership ("Bruce C") operated the McDonald's restaurant pursuant to a Franchise Agreement, dated December 10, 1994, with McDonald's Corp. (see Franchise Agreement, Not of Mot, Exh J). McDonald's Corp., as landlord, leased the subject premises to Bruce C, as tenant, pursuant to an Operator's Lease, effective the same date as the Franchise Agreement (see Operator's Lease, art. 2.01, *id.*).

The following factual allegations are gleaned from the parties' submissions. On September 29, 2008, at approximately 9:00 a.m., plaintiff and his daughter entered the McDonald's restaurant using the 181st Street entrance. Plaintiff proceeded to descend the six steps on the interior staircase leading to the main dining area of the restaurant. When he reached the third step, he slipped on a wet spot and fell to the bottom of the staircase, sustaining injury.

The Complaint essentially alleges that the incident and plaintiff's injuries were caused by the negligence of defendants in the ownership and maintenance of the restaurant, as well as by defendants' violation of certain laws and regulations enacted for the protection of the public.

The amended Bill of Particulars contains similar allegations, and adds that defendants' negligence includes failing to maintain the defective stairway. The defects include forward pitch of the landing and treads, non-uniform treads, non-

uniformly constructed steps with variances between the fourth and fifth risers, and inadequate handrail clearance and extension. The Bill of Particulars alleges that the defects constitute violations of the New York City Building Code and good and accepted safe practices. Plaintiff claims injury to his cervical and lumbar spine, left shoulder, left knee, and right thumb.

Defendants filed separate answers generally denying the allegations in the Complaint and asserting numerous affirmative defenses.

McDonald's Corp. now moves, pursuant to CPLR 3211 or 3212, to dismiss the Complaint against it.

DISCUSSION

On a motion to dismiss, pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine whether the facts as alleged fit within any legally cognizable legal theory (*Leon v Martinez, supra*). The court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*id.*, quoting *Guggenheimer v Ginsburg*, 43 NY2d 268 [1977]).

As stated, the Complaint alleges a cause of action sounding in negligence. At a deposition held on November 5, 2009, plaintiff testified that he entered the restaurant and attempted to descend the six stairs located just inside the door at 181st Street (Solis EBT, Not of Mot, Exh G, pp. 15, 17, 22). Plaintiff also testified when he reached the third step down from the top of the stairs, he left foot slipped on an accumulation of water, causing him to fall to the bottom of the stairs (*id.*, p. 45, 49). Plaintiff further testified that he grasped the handrail as he descended the stairway, and that he also grabbed the handrail after he fell (*id.*, pp. 49-51).

Negligence is the breach of a duty resulting in injury to another (*Pulka v Edelman*, 40 NY2d 781, 782-783 [1976]). The Complaint essentially alleges that defendants, as owners of the McDonald's restaurant failed to properly maintain and operate the restaurant, resulting in injury to plaintiff, a patron. Construed in the most favorable light, the Complaint sufficiently alleges a claim for negligence so as to survive a motion to dismiss.

Turning to the request for summary judgment, it is well settled that the proponent of such 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 (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d

851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, 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 (*Zuckerman v City of New York*, *supra*). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*id.*).

In order to establish a *prima facie* case of negligence, plaintiff must prove the existence of a duty of reasonable care flowing from defendant to him, and a breach of that duty resulting in injury (see *Huth v Allied Maintenance Corp.*, 143 AD2d 634, 635 [2d Dept 1988]).

In seeking summary judgment, McDonald's Corp. argues that it owes no duty to plaintiff.

Bruce C operated the McDonald's restaurant pursuant to a Franchise Agreement with McDonald's Corp. The mere existence of a franchise agreement is insufficient to impose vicarious liability on the franchisor for the acts of the franchisee (*Martinez v Higher Powered Pizza, Inc.*, 43 AD3d 670, 671 [1st Dept 2007]). There must be a showing that the franchisor exercised control over the day-to-day operations of its franchisee (*id.*).

McDonald's Corp. denies exercising control over the day-to-day operations of the restaurant where plaintiff was injured. However, plaintiff maintains that the evidence before the Court, including the agreements between McDonald's Corp. and Bruce and the transcripts of the parties' depositions, amply demonstrates that McDonald's Corp. owned the subject premises and maintained substantial control and dominion over the operations of the restaurant. Plaintiff also asserts that triable issues of fact exist as to whether McDonald's Corp. caused or created the conditions which resulted in his injuries.

McDonald's Corp. granted Bruce C the right to use the restaurant location for the term beginning December 10, 1994 and ending June 31, 2004, which term could be modified to end no later than July 31, 2014 under certain specified circumstances (Franchise Agreement, pp. 2, 2A, Not of Mot, Exh J; Operator's Lease, art. 2.01, *id.*). McDonald's Corp. also agreed to construct or prepare the premises for a McDonald's restaurant in accordance with the plans and specifications of McDonald's Corp. (Operator's Lease, art. 2.06, *id.*), and Bruce C was prohibited from altering the premises without obtaining prior written approval from McDonald's Corp. (Franchise Agreement, p. 5, *id.*; Operator's Lease, art. 4.03, *id.*).

The Franchise Agreement further states, in part:

The foundation of the McDonald's System and the essence of the Franchise is the adherence

by the Franchisee to standards and policies of McDonald's providing for the uniform operation of all McDonald's restaurants within the McDonald's System including ... serving only designated food and beverage products; the use of only prescribed equipment and building and layout and designs; strict adherence to designated food and beverage specifications and to McDonald's prescribed standards of Quality, Service and Cleanliness in Franchisee's restaurant operation. Compliance by Franchisee with the foregoing standards and policies in conjunction with the McDonald's trademarks and service marks provides the basis for the valuable good will and wide family acceptance of the McDonald's System. Moreover, the establishment of a close personal working relationship with McDonald's in the conduct of his McDonald's restaurant business, his accountability for performance of the obligations contained in this Franchise, and his adherence to the terms of the McDonald's System constitute the essence of this Franchise

(Franchise Agreement, p. 1, ¶1[c], *id.*) In addition, the Franchise Agreement states that McDonald's Corp. shall advise and consult with Franchisee periodically "in connection with the operation of the Restaurant and ... shall communicate to Franchisee its know-how, new developments, techniques and improvements in areas of restaurant management, food preparation, and service which are pertinent to the operation of a restaurant using McDonald's System (Franchise Agreement, p. 2, ¶3, *id.*).

The McDonald's manual, issued by McDonald's Corp. and applicable to all McDonald's restaurants, set forth guidelines

for maintaining a safe operation (McDonald's Manual, Aff in Opp, Exh C).

Furthermore, McDonald's Corp. retained the right to inspect the premises at all times during reasonable business hours to insure compliance with the standards and policies of McDonald's System (Franchise Agreement, p. 5, ¶ 12; Operator's Lease, cl. 7.01, *id.*). At a deposition held on September 22, 2010, Michael Bock, Operations Consultant for McDonald's Corp. testified that he performed multiple inspections of the subject premises for the purpose of promoting cleanliness, identifying disrepair, and improving the overall operations of the franchise (Bock EBT, Not of Mot, Exh H, pp. 12-15, 27-32).

On review of the submissions, the Court concludes that at the very least, triable issues of fact exist as to whether McDonald's Corp. exercised control over the day-to-day operations of the franchisee. Thus, the request for summary judgment must also be denied.

Since the note of issue was filed, this case is ready to be tried. Plaintiff shall serve a copy of this decision and order on the Clerk in Trial Support so that the case may be scheduled for trial.

Conclusion

In accordance herewith, it is hereby:

ORDERED that the motion by defendant McDonald's Corporation, also sued herein as McDonald's Franchise is denied in its entirety; and it is further

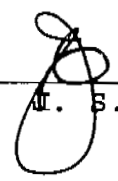
ORDERED that since the note of issue has been filed, this case is ready to be tried. Plaintiff shall serve the Office of Trial Support with a copy of this decision and order so the case may be scheduled for trial; and it is further

ORDERED that any requested relief not expressly addressed herein has nonetheless been considered by the Court and is hereby denied; and it is further

ORDERED that this shall constitute the decision and order of the Court.

Dated: 7/7/11
New York, NY

ENTER:



U. S. C.

FILED
JUL 11 2011
NEW YORK
COUNTY CLERK'S OFFICE