

Escott v Sirtaj Indo-Pak Cuisine, Inc.

2012 NY Slip Op 32224(U)

August 15, 2012

Supreme Court, New York County

Docket Number: 110661/10

Judge: Manuel J. Mendez

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

PRESENT: HON. MANUEL J. MENDEZ
Justice

PART 13

JENNIFER ESCOTT,
Plaintiff,
-against -

INDEX NO. 110881/10
MOTION DATE 07-11-12
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

SIRTAJ INDO-PAK CUISINE, INC. d/b/a
SIRTAJ RESTAURANT,
Defendant.

The following papers, numbered 1 to 9 were read on this motion for summary judgment and to strike answer and cross-motion for summary judgment and to compel:

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____ cross motion _____
Replying Affidavits _____

PAPERS NUMBERED
1 - 3, 4 - 6 FILED
7
8, 9 AUG 21 2012

Cross-Motion: X Yes No

NEW YORK
COUNTY CLERK'S OFFICE

Upon a reading of the foregoing cited papers, It is Ordered that plaintiff's motion pursuant to CPLR §3212 and CPLR §3126, for summary judgment on liability and to strike the defendant's answer, entering a default and scheduling an Inquest or for negative inference jury charge, is denied. Defendant's cross-motion pursuant to CPLR §3212, for summary judgment and seeking an Order compelling the plaintiff to appear for an independent medical examination, is denied.

Plaintiff makes this motion pursuant to CPLR §3212, for summary judgment on liability claiming that there are no issues of fact as to the cause of her injuries. Plaintiff, pursuant to CPLR §3126, seeks to strike the defendant's answer, enter a default and schedule an Inquest, alternatively, plaintiff seeks a negative jury charge based on spoliation of evidence.

Defendant opposes plaintiff's motion and cross-moves pursuant to CPLR §3212, for summary judgment on the issue of liability and seeks an Order compelling the plaintiff to appear for an independent medical examination.

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence in admissible form sufficient to require a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 571 N.E. 2d 645; 569 N.Y.S. 2d 337 [1999]). Summary judgment should not be granted where triable issues of

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

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fact are raised and cannot be resolved on conflicting affidavits (Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y.S. 2d 18, 215 N.E. 2d 341 [1966] and Brunetti v. Musallam, 11 A.D. 3d 280, 783 N.Y.S. 2d 347 [N.Y.A.D. 1st Dept., 2004]).

To meet its prima facie burden in support of summary judgment on the issue of negligence the defendant is required to prove it had no actual or constructive knowledge of a dangerous defect or condition (Burko v. Friedland, 62 A.D. 3d 462, 878 N.Y.S. 2d 64 [N.Y.A.D. 1st Dept., 2009]). The issue of whether a defect creates a dangerous condition for purposes of establishing liability is generally an issue of fact for the jury (Trincere v. County of Suffolk, 90 N.Y. 2d 976, 688 N.E. 2d 489, 665 N.Y.S. 2d 615 [1997]). To establish that the defendant is liable for a defective condition on the premises the plaintiff has the burden of proving the condition was visible and apparent for a sufficient length of time prior to the accident to permit employees to discover and remedy it. A general awareness of a dangerous condition is insufficient to establish constructive notice (Gordon v. American Museum of Natural History, 67 N.Y. 2d 836, 501 N.Y.S. 2d 646, 492 N.E. 2d 774 [1986]). Without actual or constructive notice of a latent defect, a defendant has no duty to inspect for specific problem (Glaccio v. 179 Tenants Corp., 45 A.D. 3d 454, 845 N.Y.S. 2d 328 [N.Y.A.D. 1st Dept., 2007]).

A plaintiff seeking to recover under the doctrine of res ipsa loquitur is required to establish that, "(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff" (Dermatossian v. New York City Tr. Auth., 67 N.Y. 2d 219219, 492 N.E. 2d 1200, 501 N.Y.S. 2d 784 [1986]). Exclusive control requires that plaintiff demonstrate the defendant was probably responsible for any negligence connected with the cause of the accident, plaintiff does not have to establish sole physical access to the instrumentality. A regular inspection and maintenance of a chair by the defendant is potential evidence of negligence (Dawson v. National Amusements, Inc., 259 A.D. 2d 329, 687 N.Y.S. 2d 19 [N.Y.A.D. 1st Dept., 1999]).

Plaintiff claims that on August 10, 2009, at approximately 1:15p.m., she was injured after ordering food in Sirtaj Restaurant, while pulling the chair under her. Plaintiff claims that the top part of the seat came apart from the metal frame, trapped her left index finger and severed the tip as she sat down. Plaintiff seeks summary judgment pursuant to CPLR §3212, on liability claiming that defendant had actual and constructive notice of the dangerous condition of the chair. Plaintiff claims that defendant is also liable under the doctrine of res ipsa loquitur.

In support of the motion the plaintiff relies on her own deposition testimony, she states that prior to August 10, 2009, her finger had been pinched by a chair when the seat cover slid after it became loose. She had advised a female cashier of what happened, showing the cashier the chair involved (Mot. Exh. J, pp 23-26). Plaintiff could not remember the date when her finger was pinched but indicated the same person involved was working in the restaurant on the date of the incident (Mot. Exh. J, pp 24-26). She claims that on August 10, 2009, she told the female cashier that the chair had cut off the fingertip and showed the cashier the chair. Plaintiff stated she showed the cashier where the seat cover had become detached on the chair and in doing so the tip of her finger fell to the ground. While waiting for the ambulance, plaintiff had her friend

take a picture of the seat while she used her foot to hold it up (Mot. Exh. J, pp 28-29). Plaintiff provides a copy of the photograph taken with her friend's cellphone on the date of the accident to establish the defect was visible and apparent (Mot. Exh. P).

Gurdev Rana was deposed on August 31, 2011, he states that he and his wife owned and operated the restaurant and that Sirtaj Indo-Pak Cuisine, Inc. was dissolved as of 2010 (Mot. Exh. M, pp 11 & 13). Gurdev Rana states that at night the floors were mopped and the chairs were placed on the tables (Mot. Exh. M, pp 15-16). The chairs and tables were in the restaurant when it was purchased, they were not repaired or replaced in twenty years (Mot Exh. M, pp.19, 24). Gurdev Rana was not in the restaurant on August 10, 2009, but his wife was there (Mot. Exh. M, pp 19-20). He inspected the chair two days after the accident and claims that after checking every chair at the table where the plaintiff sat he could not find any defective chairs (Mot. Exh. M, pp 23-24).

Gurinder Rana was deposed on November 15, 2011, she states that on August 10, 2009, she was working the counter at the restaurant (Mot. Exh. O, p. 8). Mrs. Rana stated that after she was told the plaintiff was hurt by a delivery man, the chairs were inspected and there was nothing wrong with them (Mot. Exh. O, pp 11-12). She inspected the chair a day after plaintiff was injured and stated that the chairs were moved after the cleaning (Mot. Exh. O, pp 13-14). Gurinder Rana claims that she was unaware of any other injuries in the restaurant prior to plaintiff (Mot. Exh. O, p. 21).

Plaintiff claims that the defendant had actual notice of the accident because she reported a similar defect with the chair that pinched her to a female employee. Plaintiff claims the female employee she advised of the pinch was Gurinder Rana, one of the owners of the business. She claims the defendant had constructive notice of the condition because the chair seats were attached to the metal frame by screws and that the defendant's employees could have detected any defects when they lifted the chairs off the floor to mop it. Plaintiff claims the defendant created the hazardous and defective condition by failing to inspect, repair or replace the chairs in twenty years, ignoring wear and tear. Plaintiff claims she is entitled to summary judgment under *res ipsa loquitur* because absent the defendant's negligence she would not be injured and the defendant maintained exclusive control of the chair at all times. She claims that the defendant had exclusive control and another patron using the chair in a normal manner would not have caused the severe defect to the chair. Plaintiff claims that she handled the chair in a normal manner and did not act or contribute to the defect that severed her finger.

Defendant opposes the motion and cross-moves for summary judgment claiming that there was no actual or constructive notice of the defect. Defendant claims that the plaintiff described a different defect when the chair pinched her, and a sliding seat cover is not the same as a seat cover that is detached on one side and acting like a scissors. Defendant claims that notice of a general unrelated problem is not enough to establish actual notice. Defendant claims that plaintiff cannot establish constructive notice because both Mr. and Mrs. Rana testified they conducted inspections of the chair which resulted in no finding of defects and they had no knowledge of any defects prior to plaintiff's injury. Defendant claims that the picture provided by plaintiff should be treated as hearsay. To the extent the picture is considered by the Court, defendant claims that plaintiff had to prop the seat cover with her foot to make the defect visible. Defendant claims that the plaintiff has not established duration of the defect. Defendant claims

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plaintiff is not entitled to summary judgment under the theory of res ipsa loquitur because plaintiff cannot establish that it created the defective condition, there was no claim that the employees affirmatively damaged the chair, or loosened the seat to create the condition.

The conflicting deposition testimony and the evidence submitted by the parties does not establish definitively whether the defendant had actual or constructive notice of the defective chair. The plaintiff's testimony is not specific as to notice. The testimony provided on behalf of the defendant is conflicting concerning when, and the manner in which either Mr. or Mrs. Rana conducted inspections of the chair. Under the theory of res ipsa loquitur, plaintiff does not have to establish that the defendant was negligent, only that her injury would not have occurred without negligence. Defendant has raised an issue of fact concerning whether it had exclusive control of the defective chair.

Courts have discretion to impose sanctions when a party "intentionally, contumaciously or in bad faith" destroys evidence prior to an adversary's inspection. Destroyed evidence that is not crucial to the case, or which is discarded in good faith based on normal business practices prior to pending litigation is not a basis for sanctions (*Sage Realty Corporation v. Proskauer Rose LLP*, 275 A.D.2d 11, 713 N.Y.S.2d 155 [N.Y.A.D. 1st Dept., 2000]). Discovery sanctions pursuant to CPLR §3126 are inappropriate where the plaintiff filed a Note of Issue waiving further disclosure and not reserving rights or preserving objections (*Rivera-Irby v. City of New York*, 71 A.D.3d 482, 896 N.Y.S.2d 337 [N.Y.A.D. 1st Dept., 2010]).

Plaintiff seeks sanctions for spoliation based on discovery that was indicated in the Preliminary Conference Order (Mot. Exh. 6). The Note of Issue was filed on December 1, 2011, pursuant to a stipulation (Cross-Mot. Exh. D). The Certificate of Readiness indicates under discovery known to be necessary completed, that it was waived (Cross-Mot. Exh. D). Plaintiff has not preserved the right to seek sanctions for spoliation after Note of Issue was filed.

Pursuant to 22 NYCRR 202.21[d], leave to conduct further discovery after the filing of the note of issue and certificate of readiness are filed is permitted under, "unusual or unanticipated circumstances," and only to "prevent substantial prejudice." Failure of a prior attorney to pursue discovery is an insufficient basis to obtain further discovery after the filing of the note of issue (*Madison v. Sama*, 92 A.D.3d 607, 938 N.Y.S.2d 802 [N.Y.A.D. 1st Dept., 2012]).

Defendant seeks to compel plaintiff to submit to an independent medical examination by its doctor after the Note of Issue was filed. There were at least two prior orders directing defendant to conduct a medical examination (Reply and Opp. to Cross-Mot. Exhs. C & D). The Status Conference Order dated December 7, 2011, after the Note of Issue was filed, provides that failure of the defendant to complete an independent medical examination ("IME") will result in it being waived (Reply and Opp. to Cross-Mot. Exh. D). Defendant claims that an associate, no longer with the firm, failed to have an independent medical examination scheduled and conducted. Law office failure and failure of the associate to pursue discovery after multiple orders is not an unusual or unanticipated circumstance. Defendant has not asserted a basis to obtain an independent medical examination.

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Upon review of all the papers submitted this Court finds that there remain issues of fact based on conflicting testimony concerning whether the defendant had notice that the chair was defective and whether there was exclusive control of the chair. Plaintiff has not established that sanctions are warranted for spoliation and defendant will not be provided with a further opportunity to obtain a medical examination.

Accordingly, it is ORDERED that the plaintiff's motion pursuant to CPLR §3212 and CPLR §3126, for summary judgment on liability and to strike the defendant's answer, entering a default and scheduling an Inquest or for negative inference jury charge, is denied, and it is further,

ORDERED that the Defendant's cross-motion pursuant to CPLR §3212, for summary judgment and seeking an Order compelling the plaintiff to appear for an independent medical examination, is denied.

This constitutes the decision and order of this court.

ENTER:



MANUEL J. MENDEZ,

J.S.C. MANUEL J. MENDEZ
J.S.C.

Dated: August 15, 2012

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

FILED

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