

Crane v Bombay

2012 NY Slip Op 32505(U)

October 1, 2012

Sup Ct, New York County

Docket Number: 113102/2010

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. JUDITH J. GISCHE
J.S.C.

PRESENT: _____
Yce _____

PART 10

Index Number : 113102/2010
CRANE, ELAINE F.
vs
SALAAM BOMBAY
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

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


**MOTION IS DENIED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

FILED

OCT 02 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: Oct 1, 2012


HON. JUDITH J. GISCHE J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
ELAINE CRANE AND STEPHEN CRANE,

Plaintiff,

-against-

SALAAM BOMBAY,

Defendant.
-----X

DECISION/ORDER
Index No. 113102/2010
Seq #: 001

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	FILED	Numbered
Def's n/m (3212) w/ NH affirm, exhs		1
Pltf's opp w/ EH affirm, EC affid		2
Def's reply w/NH affirm	OCT. 02 2012	3

Upon the foregoing papers, the decision and order of the court is as follows:

NEW YORK
COUNTY CLERK'S OFFICE

Gische J.:

This is a negligence action by Elaine Crane ("Plaintiff") for personal injuries. Stephen Crane ("Mr. Crane"), Plaintiff's husband, asserts a derivative action for loss of services. Issue was joined and the note of issue was filed certifying that discovery was complete. Presently before the Court is a timely motion for summary judgment by defendant Salaam Bombay Restaurant ("Salaam Bombay" or "Defendant"). Since the matter is properly before the court, it will be decided on the merits (CPLR § 3212; Brill v. City of New York, 2 N.Y.3d 648 [2004]). For the reasons set forth below, Salaam Bombay's motion for summary judgment is denied.

Facts and Arguments

The following facts are undisputed unless otherwise indicated:

On July 17, 2020, while walking southbound on Greenwich Street with her husband and grandson, Plaintiff tripped and fell over the wheel of a bicycle chained to scaffolding on the sidewalk. Although not denying the root of Plaintiff's injuries, there is a sharp dispute between Plaintiff and Defendant about whether the bicycle belongs to Salaam Bombay. Plaintiff claims that the improperly parked bicycle belongs to Salaam Bombay, who denies ownership of the bicycle.

Plaintiff has provided a verified bill of particulars and she was deposed. Mr. Crane, who was present at the time of the accident, was also deposed. Plaintiff testified at her deposition that while walking past Salaam Bombay, she tripped and fell over the front wheel of an "improperly parked" bicycle. According to Plaintiff, her foot got caught in the front wheel of a bicycle that was "perpendicular" to the body of the bicycle, causing her to lurch forward over the wheel and fall onto and injure her left arm. Plaintiff testified that there were two bicycles chained to the scaffolding pole at the time of the accident. Although Plaintiff is unsure of the exact location of the chained bicycles, she testified that she had passed the red awnings of Salaam Bombay before falling. When asked the location of her fall, Plaintiff testified that she fell where the bicycles were chained, and that is as precise a location as she can give. Plaintiff does not recall the color or brand of the bicycle that she fell over and states she "never looked [after her fall] to see exactly where the bikes were chained in relation to the stanchions of the scaffolding."

Plaintiff testified that she learned Salaam Bombay owned the bicycle when she visited the restaurant approximately one month after she fall. She stated, "[a] person that [she] understood to be the manager of the restaurant" told her that the bicycle

belonged to Salaam Bombay. Plaintiff, however, did not know the man's name or if he was actually the manager of the restaurant. Plaintiff further testified that she was not certain that the bicycle the "manager" claimed ownership of was, in fact, the same bicycle that caused Plaintiff to trip and fall.

At his deposition, Mr. Crane testified that although he could not recall the color or brand of the bicycle causing injury, he "remember[s] mainly the chain" that secured the bicycle to the scaffolding. According to Mr. Crane, the chain was distinctive because "the links weren't the kind of curved links that you see. For the most part... they [were] squarish." When he returned to the scene of the accident on August 22, 2012 to take photographs, he testified that he recalled seeing what appeared to be the same bicycle in the same location, with the same chain.

Kedar Shah ("Kedar"), the manager of Salaam Bombay, was also deposed. He testified at his deposition that the restaurant does not own the bicycle in question. Kedar testified that at the time of Plaintiff's fall, the restaurant was closed. Further, Kedar stated that the deliveryman on duty on the date of Plaintiff's accident rides a moped, rather than a bicycle. According to Cedar, it is the restaurant's policy to park all delivery bicycles around the corner from the restaurant because he did not want to, "create any issues with my own customers coming in and out of the restaurant."

Additionally, Kedar testified that he is the sole manager of the restaurant. Kedar stated that one week prior to the deposition, Plaintiff visited the restaurant and requested to speak with a manager. Kedar testified that Plaintiff stated she had spoken with a "manager" in the past about ownership of the bicycle in question, but when Kedar asked Plaintiff whom she spoke to, but "she couldn't come up with a name." Kedar

stated that even with his entire staff working when Plaintiff came to the restaurant, Plaintiff could not identify any of these persons as the "manager" she allegedly spoke to. According to Kedar, Plaintiff assumed the person she spoke with was a manager "because he was well dressed." Kedar further testified that after his conversation with Plaintiff, he asked his staff whether any of them had talked to Plaintiff or anyone about the accident, but was told "no one had any conversation or recognized her. Nor... was anyone ever approached about the matter."

Salaam Bombay maintains that its motion should be granted for two reasons: first, because Plaintiff did not injure herself on Salaam Bombay's property or the sidewalk abutting Salaam Bombay's property. Second, because Salaam Bombay did not own, use or control the bicycle that caused Plaintiff's fall. Furthermore, Salaam Bombay argues that the crux of Plaintiff's claim depends on her alleged conversation with a "manager" at Salaam Bombay. Salaam Bombay asserts that Plaintiff's alleged conversation is inadmissible hearsay and thus Plaintiff provides no evidence to support her claim. Even if the conversation were evidence in admissible form, Salaam Bombay argues that a conversation five weeks after Plaintiff's accident is insufficient to prove its ownership of the bicycle.

In opposition to Salaam Bombay's motion, Plaintiff argues that Defendant failed to prove that there is no genuine issue of material fact warranting a trial. Plaintiff maintains that there is a triable issue of fact whether the bicycle was owned by Salaam Bombay because Salaam Bombay failed to provide any evidence showing the contrary. Additionally, Plaintiff contends that she was justified in assuming the person she conversed with at Salaam Bombay on August 22, 2010 was a manager because he was

dressed differently than the rest of the staff and that the conversation is admissible under the "speaking agent" exception to the hearsay rule.

Discussion

A movant seeking summary judgment in its favor must make a prima facie showing of entitlement to a judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). Only if movant's burden is met does the burden then shift to the opposing party to demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320,324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]).

As an initial matter, NYC Admin Code § 7-210 (the "sidewalk law") does not apply to the facts of this case, as alleged, because Plaintiff's injury did not occur on the sidewalk adjacent to Salaam Bombay. NYC Admin Code § 7-210 states in part:

- a. It shall be the duty of the owner of real property abutting any sidewalk... to maintain such sidewalk in a reasonably safe condition.
- b. Notwithstanding any other provision of 1a, the owner of real property abutting any sidewalk... shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk...
- c. Notwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks... in a reasonably safe condition.

Plaintiff states that she fell "three or four steps" past Salaam Bombay, not on the sidewalk directly in front of the restaurant. Furthermore, Plaintiff's makes no claim that her injury was caused by a defect in the sidewalk itself, but a bicycle negligently positioned on the sidewalk (Ortiz v. City of New York, 67 A.D.3d 21 [1st Dept. 2009]) (holding that pedestrian ramps attached to sidewalks are not governed by the "sidewalk law"); (Vucetovic v. Epsom Downs, Inc., 10 N.Y.3d 517 [2008]). Therefore, the sidewalk law does not apply to the facts of this case.

A separate but related issue is whether Salaam Bombay owned the bicycle that caused Plaintiff's injuries. Even if Plaintiff's injury did not occur on the sidewalk abutting Salaam Bombay, Defendant may still be held liable if it created the dangerous condition alleged (Hausser v. Guinta, 88 N.Y.2d 449, 453 [1996]). Defendant's argument, that summary judgment should be granted because Plaintiff failed to demonstrate that Salaam Bombay owned the bicycle in question is, therefore, rejected. Defendant's argument that Plaintiff is unable to prove defendant's ownership of the bicycle impermissibly shifts the burden from defendant to disprove its negligence by eliminating all triable issues of fact placing it on plaintiff – the non-moving party. "As a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense" (Mennerich v. Esposito, 4 A.D.3d 399, 400 [2d Dept. 2004]).

Arguments by defendant that Plaintiff cannot identify the brand or make of the bicycle that caused her injuries do not justify the grant of summary judgment. Defendant has not proven it did not own the bicycle involved in plaintiff's accident. Notably absent from defendants' motion (and its prima facie case) is any affidavit from

the delivery people. Thus, it is for the jury to decide these disputed issues of fact and Salaam Bombay's motion for summary judgment must be denied (See Mennerich v. Esposito, 4 A.D.3d at 401; Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]).

Conclusion and Order

In accordance with the foregoing, it is hereby,

ORDERED that the Salaam Bombay's motion is denied in all respects; and it is further:

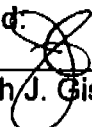
ORDERED that this case is ready to be tried; Plaintiff shall, within 30 days of this decision/order appearing on SCROLL (the Supreme Court Record On Line Library), serve a copy of this decision/order upon the office of trial support so the case can be schedule for trial; and it is further:

ORDERED that any relief requested by not specifically addressed is hereby denied; and it is further:

ORDERED that this constitutes the decision and order of the Court.

Dated: New York, New York
October 1, 2012

So Ordered:



Hon. Judith J. Gische, JSC

FILED

OCT 02 2012

NEW YORK
COUNTY CLERK'S OFFICE