

**Wajner-Tobias v Delizia Restaurant Corp.**

2013 NY Slip Op 31096(U)

April 24, 2013

Sup Ct, New York County

Docket Number: 107791/10

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN  
Justice

PART 7

BELLA WAJNER-TOBIAS and DAVID TOBIAS,  
Plaintiff,  
- against -

INDEX NO. 107791/10

MOTION SEQ. NO. ~~001~~ 003

DELIZIA RESTAURANT CORP. and PECORA REALTY,  
LLC,  
Defendants.

**FILED**

MAY 21 2013

The following papers, numbered 1 to 3, were read on this motion by plaintiff for summary judgment on liability as against Delizia Restaurant Corp., pursuant to CPLR 3212.

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COUNTY OF NEW YORK	
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Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) \_\_\_\_\_

Replying Affidavits (Reply Memo) \_\_\_\_\_

Cross-Motion:  Yes  No

This is a negligence "trip and fall" action brought by Bella Wajner-Tobias (plaintiff) and her husband David Tobias (Mr. Tobias), derivatively, to recover damages for injuries allegedly sustained when plaintiff was struck by the sidewalk gate/vault doors in front of 1374 First Avenue, New York, NY (the premises). The premises is occupied by Delizia Restaurant Corp. (Delizia) and owned by Pecora Realty, LLC. Now before the Court is a motion by plaintiff, pursuant to CPLR 3212, for summary judgment on the issue of liability as against Delizia. Delizia has responded in opposition to the herein motion. Discovery in this matter is complete and the Note of Issue has been filed.

BACKGROUND

This action arises out of an accident that occurred on May 31, 2010 in front of Delizia at approximately 12:15 a.m. (see Plaintiff Deposition [EBT], exhibit A, p. 13, 15; Plaintiff Affidavit in Support ¶ 4). Plaintiff alleges that the accident resulted in an physical injuries. Plaintiff

testified that she was walking with her husband in their neighborhood, and as they were passing Delizia an employee by the name of "Ali" opened the sidewalk gate, outwardly, from the inside (*id.* at 16, 18, 23; *id.*). Since plaintiff happened to be directly above the sidewalk gate in mid-stride while walking when it opened, the gate hit her right leg, causing her to fall forward. Plaintiff testified that she noticed that there were two doors attached to the sidewalk gate and the employee opened one of the doors outward, from the inside; more specifically the first door closer to downtown (*id.* at 24-25, 27-29; *id.*). Plaintiff testified that when the sidewalk gate opened she was looking forward, and as she fell her hands came in contact with the ground first and she was bleeding from her left knee and her left hand. Plaintiff maintains that "Ali," repeatedly said "I'm sorry" (*id.* at 31, 33, 89; *id.*).

After the accident, plaintiff testified that her husband knocked on the restaurant door to see if anyone was there, but the lights were out (*id.* at 92; see Notice of Motion, Mr. Tobias EBT, exhibit B at 18). Upon return to their home, Mr. Tobias testified that he tried calling the telephone number listed on Delizia's menu, but he claims no one answered. He subsequently emailed Delizia through their website notifying them that the plaintiff had an accident in front of their store caused by someone named "Ali" (*id.*). Mr. Tobias testified that two days later the plaintiff received a telephone call, but he did not know who specifically called from Delizia as plaintiff took the call (see Notice of Motion, Mr. Tobias EBT, exhibit B at 17-18).

Delizia is owned by Frank Liparoto (Liparoto), Frank Pecora (Pecora) and Antonio Pecora. Liparoto testified at this deposition that he first heard of the accident when Candido Hernandez (Hernandez), an independent contractor working with the restaurant, called him (Notice of Motion, exhibit F at 13). Liparoto states that Hernandez told him that Elias Rojas (Rojas) one of their employees, was entering the basement through the sidewalk vault doors to put his bicycle away, and as he closed the vault door behind him his jacket got caught (*id.*). Liparoto testified that Hernandez told him that when Rojas lifted the door momentarily with his

shoulder to free himself, someone fell (*id.*). Liparoto maintains that by the time he came to the front of Delizia to see what happened the woman was already gone, so he closed the cellar door (*id.* at 14). Liparoto testified that he eventually spoke with Rojas who then reiterated the same story that Hernandez told him originally (*id.* at 19). As to the normal practice regarding the operation of the sidewalk gate doors, Liparoto maintains that there is a padlock on the outside so that the doors can only be accessed from the outside (*id.* at 20). It was not common practice that these doors are opened from the inside (*id.*).

Pecora testified at his deposition that he found out about the accident when he spoke with Liparoto. He maintains that he was told that someone fell outside of the restaurant near the sidewalk gate doors as an employee was bringing in a bicycle (Notice of Motion, exhibit E at 18-19). Pecora testified that employees of Delizia were instructed of the common policy to never to open the sidewalk vault doors from inside the basement (*id.* at 31- 32). According to Pecora, this is why the sidewalk vault doors have pad locks placed on the outside (*id.*).

Now before the Court is plaintiff's motion for summary judgment on the issue of liability as against Delizia. In support of her motion plaintiff submits, *inter alia*, a picture of the sidewalk gate doors located in front of Delizia, depositions of the plaintiff, Mr. Tobias and Liparoto. In opposition Delizia submits, *inter alia*, an attorney affirmation which cites to Liparoto's deposition testimony.

#### STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1984]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985];

*Santiago v. Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006]; CPLR 3212 [b]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Smalls v. AJI Indus. Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v. Citibank Corp.*, 100 NY2d 72, 81 [2003]; see also *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues of fact exist, not to determine the merits of any such issues (see *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (see *Negri v. Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (see *Rotuba Extruders, Inc. v. Ceppos*, 46 NY2d 223, 231 [1978]).

#### DISCUSSION

Plaintiff moves for summary judgment on liability on the ground that there are no material issues of fact because a Delizia employee negligently opened the sidewalk gate doors, outwardly, as she was walking over it, causing her to fall and injure her arm (see Plaintiff EBT, exhibit A at pgs. 16, 18 and 23; Plaintiff Affidavit in Support ¶ 4). Delizia maintains that plaintiff's accident is one which could have occurred in the absence of negligence, and furthermore, Rojas first opened the cellar doors from the outside which is consistent with the normal practice of Delizia. Delizia claims there are procedures in place that employees are told to follow regarding the operation of the sidewalk gate doors. Specifically, it was common policy for Delizia employees that the basement vault doors should never be opened from the inside, and this is why the locks for these doors are placed on the outside (see Pecora EBT, exhibit E,

31- 32; Liparoto EBT, exhibit F at 20).

The Court finds that plaintiff has met her prima facie burden of establishing her entitlement to summary judgment as a matter of law on the issue of liability as against Delizia through the submission of evidence which demonstrates that Delizia was negligent in violating its own rules regarding the operation of the sidewalk vault doors (*see Lowenstein v Normandy Group, LLC*, 51 AD3d 517 [1st Dept 2008]).

In opposition, Delizia relies on the deposition testimony of Liparoto to raise a triable issue of fact. Plaintiff proffers that the affirmation of Delizia's attorney in opposition only cites to the deposition testimony of Liparoto, whose testimony regarding the circumstances of plaintiff's accident consists of double hearsay, which should be disregarded by the Court. The deposition testimony quoted to in opposition shows that Liparoto became aware of plaintiff's accident by a telephone call from Hernandez, who explained what happened, and that Hernandez had become aware of plaintiff's accident from Rojas. Subsequently, Liparoto informed Pecora of the same (Pecora Deposition, Exhibit E, p. 18-19). The Court agrees that this testimony constitutes double hearsay (*see Quinn v 1649 Restaurant Corp.*, 18 AD3d 281[1st Dept 2005] [plaintiff's testimony regarding what defendant's owner told her about what defendant's manager told him about her husband's condition, constituted inadmissible double hearsay]).

Moreover, "[w]hile hearsay evidence may be utilized in opposition to a motion for summary judgment, such evidence is insufficient to warrant denial of summary judgment where it is the only evidence upon which the opposition to summary judgment is predicated" (*Briggs v 2244 Morris LP*, 30 AD3d 216 [1st Dept 2006]; *see also Narvaez v NYRAC*, 290 AD2d 400 [1st Dept 2002]). As such, the Court finds that Delizia has failed to raise a triable issue of fact in opposition, as Delizia relies only on evidence that constitutes hearsay testimony which is insufficient to defeat the plaintiff's summary judgment motion (*see Briggs v 2244 Morris LP*, 30 AD3d 216 [1st Dept 2006]). Accordingly, plaintiff's motion must be granted.

CONCLUSION

For these reasons and upon the foregoing papers, it is,

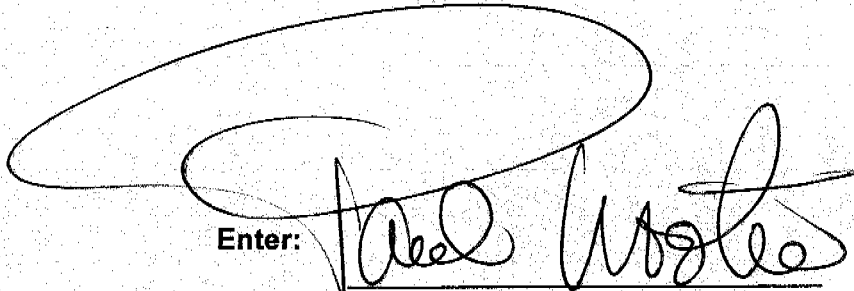
ORDERED that plaintiff's motion for summary judgment as to liability only as against defendant Delizia Restaurant Corp., pursuant to CPLR 3212, is granted; and it is further,

ORDERED that the plaintiff is directed to serve a copy of this Order, with Notice of Entry, upon plaintiff and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 4-24-13

Enter:

  
PAUL WOOTEN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate: :  DO NOT POST  REFERENCE

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