

Weiner v Dinex Group, LLC

2014 NY Slip Op 32697(U)

October 9, 2014

Supreme Court, New York County

Docket Number: 151802/2012

Judge: Arthur F. Engoron

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

-----X
JACK WEINER and DIANA WEINER,

Plaintiffs,

- against -

THE DINEX GROUP, LLC and 64 WEST
RESTAURANT, LLC d/b/a BAR BOULUD/BOULUD
SUD,

Defendants.

-----X
THE DINEX GROUP, LLC and 64 WEST
RESTAURANT, LLC d/b/a BAR BOULUD/BOULUD
SUD,

Third-Party Plaintiffs,

- against -

BUS-TEV LLC d/b/a EARLY MORNING SEAFOOD,

Third-Party Defendants.

-----X
Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 4, were used on plaintiff's motion for summary judgment on the issue of liability and defendant's cross-motion for summary judgment dismissing the complaint:

Papers Numbered:

| | |
|---|---|
| Notice of Motion - Affirmation - Exhibit | 1 |
| Notice of Cross-Motion - Affirmation - Affidavit - Exhibits | 2 |
| Affirmation in Opposition to Cross-Motion | 3 |
| Reply Affirmation | 4 |

Brief Background

For purposes of the instant motion and cross-motion the parties do not dispute the central facts of this case. On February 13, 2012 at approximately 12:30 p.m., plaintiffs Jack Weiner and his wife Diana Weiner had lunch at Boulud Sud Restaurant, located at 20 West 64th Street in Manhattan.

Mr. Weiner ate chickpea soup, skate, and a sorbet. Mrs. Weiner had the salmon appetizer, skate, and a sorbet. They did not share their meals with each other. Mr. Weiner did not notice any smells or pungent orders from any of the food he ate, and he consumed his entire meal. He did not feel sick or nauseous at the restaurant. Neither plaintiff made any complaints to the restaurant staff about the meal during the meal or anytime thereafter.

After lunch, plaintiffs went to a nearby movie theater. Mr. Weiner did not feel sick or nauseous or vomit during the movie.

At approximately 4:00 to 4:30 p.m., while plaintiffs were walking from the theater to their daughter's apartment, Mr. Weiner began vomiting. He continued to vomit while at his daughter's apartment. According to Mr. Weiner, he had an "awful taste and it just kept coming and never stopping [sic]." He could taste chickpea soup while vomiting. Mr. Weiner did not suffer from diarrhea.

Mrs. Weiner contacted 911 and an ambulance took Mr. Weiner from his daughter's apartment to Roosevelt Hospital, where he was diagnosed with aspiration pneumonia. The hospital did not test Mr. Weiner's vomit or take any stool samples. The hospital did not test the contents of his stomach. There is no laboratory analysis linking the alleged food poisoning to the food at Boulud Sud. The doctors at the hospital did not tell Mr. Weiner that lab results showed the existence of bacteria or other pathogens in his body.

Plaintiffs did not complain to the restaurant or file any complaints or reports with any city administrative agency. Boulud Sud claims that no one else complained of food poisoning on February 13, 2012. The restaurant did not receive any related health code violations from the city or state department of health.

The Instant Action

On April 12, 2012, plaintiffs commenced the instant action, which seeks damages for the alleged February 13, 2012 food poisoning, by e-filing a summons and complaint. On June 25, 2012, plaintiffs e-filed an amended complaint alleging that defendants are liable to plaintiffs for damages arising from the alleged food poisoning under the theories of negligence, strict liability in tort, breach of express warranty and breach of implied warranty.

In their answer, defendants denied the material allegations of the amended complaint and raised several affirmative defenses. On July 9, 2012, defendants commenced a third-party action against Bus-TeV LLC d/b/a Early Morning Seafood, defendants' seafood supplier, for contribution for any damages plaintiff recovers against defendants. On March 14, 2014, defendants discontinued the third-party action without prejudice.

The Instant Motion and Cross-Motion

Plaintiffs now move for summary judgment on the issue of liability. In support of the motion, plaintiffs submit the affirmation of their attorney and the affirmation of Charles Gerson, M.D.,

Mr. Weiner's treating physician. Plaintiffs did not submit their own affidavits, the pleadings (as required by CPLR 3212), the deposition transcripts or any other evidence in support of their motion.

In his affirmation, plaintiff's attorney asserts that, given Mr. Weiner's deposition testimony that he tasted chickpea soup in his vomit, it is "obvious[] ... that the chickpea soup was what caused the 'illness' which caused the vomiting." Dr. Gerson opines "with a reasonable degree of medical probability that Mr. Weiner contracted aspiration pneumonia as a result of his ingesting chickpea soup at Boulud Sud restaurant." A doctor's opinion based upon a "reasonable degree of medical probability," is sufficient. See, Matott v Ward, 48 NY2d 455, 461-462 ("it is not a dictionary diletantism that is to govern, but whether it is 'reasonably apparent' that 'the doctor intends to signify a probability supported by some rational basis'.").

Defendants now cross-move for summary judgment dismissing the complaint. In support of their motion (and in opposition to plaintiffs' main motion), defendants submit the affirmation of their attorney, and the affidavit of John-Paul O'Neil, defendants' director of operations and the general manager of Boulud Sud on February 13, 2012. Defendants annexed the pleadings, deposition transcripts, deposition exhibits, and the stipulation discontinuing the third-party action. Defendants did not submit an affirmation from a doctor.

Defendants argue that plaintiffs failed to prove their prima facie case and are "speculating" as to the cause of plaintiff's vomiting. Defendants urge that in the absence of "tests" of Mr. Weiner's vomit, excreta and stomach and "lab results" showing pathogens or bacteria in Mr. Weiner's blood, and given the fact that no health code violations were issued to Boulud Sud on February 13, 2012, plaintiffs have not and cannot establish that the food Mr. Weiner ate at Boulud was contaminated and caused him to vomit.

Discussion

"As repeatedly held, the remedy of summary judgment is a drastic one, which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable, since it serves to deprive a party of his day in court." Gibson v Am. Export Isbrandtsen Lines, 125 AD2d 65, 74 (1st Dept 1987).

"[T]he proponent of a summary judgment 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. (*Citations omitted.*) Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986).

Here, neither plaintiff nor defendant has established entitlement to summary judgment. To the contrary, the record demonstrates the existence of triable issue of fact as to the cause of plaintiff Jack Weiner's vomiting.

Plaintiffs failed to establish, prima facie, that the food eaten at Boulud Sud on February 13, 2012 caused the vomiting. The affirmation of Charles Gerson, M.D. is insufficient to establish, as a matter of law, that the chickpea soup Mr. Weiner ate caused his vomiting and "aspiration pneumonia." Dr. Gerson does not set forth the date or dates on which he examined and treated Mr. Weiner, whether he reviewed the hospital records and reports, whether he performed any independent medical tests on Mr. Weiner during the exams, and, if so, the results of such tests, and the course of treatment prescribed. Note that Dr. Gerson only referred to a "probability."

In view of plaintiff's failure to meet their burden on their summary judgment motion, defendants were not required to make an evidentiary showing of the existence of a triable issue of fact on causation. See, Alvarez v Prospect Hosp., supra. In other words, plaintiffs' motion for summary judgment would have been denied even if unopposed by defendants.

Similarly, defendants failed to establish, as a matter of law, the absence of any issues of fact as to causation. Defendants' argument that plaintiffs' case is based upon "impermissible speculation" is not persuasive as it is unsupported by an affirmation of a doctor that the chickpea soup could not have caused the vomiting.

Conclusion

Motion and cross-motion denied.

Dated: October 9, 2014



Arthur F. Engoron, J.S.C.