

Delmar v Burger King Corp.
2015 NY Slip Op 30991(U)
May 6, 2015
Supreme Court, Bronx County
Docket Number: 307681/12
Judge: Mark Friedlander
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NEW YORK SUPREME COURT-COUNTY OF BRONX
PART IA-25

MICHAEL DELMAR,

Plaintiff,

-against

BURGER KING CORPORATION, POPEYE'S
LOUISIANA KITCHEN, GRAND CONCOURSE
REALTY CORP. AND LAL RESTAURANT
GROUP, INC.,

Defendants.

HON. MARK FRIEDLANDER

MEMORANDUM
DECISION/ORDER
Index No. 307681/12

Defendants, Burger King Corporation ("Burger King") and Popeye's Louisiana Kitchen ("Popeye's"), move for an order, pursuant to CPLR§3212, granting Burger King and Popeye's summary judgment dismissing plaintiff's complaint and all cross-claims against them. The motion is decided as hereinafter indicated.

This is an action by plaintiff to recover monetary damages for personal injuries allegedly sustained by him on August 12, 2011, as a result of his slipping and falling at a restaurant premises used by both Burger King and Popeye's, located at 557 Grand Concourse, Bronx, New York. More specifically, plaintiff alleges that defendants Burger King and Popeye's caused and created a hazardous condition in negligently mopping the floor of their restaurant and failing to post warning signs that the floor was wet.

In support of the motion, defendants Burger King and Popeye's submit a copy of the pleadings, and the deposition transcripts of plaintiff and of Harunar Rashid ("Rashid"). In opposition to the motion, plaintiff submits a photograph showing the location at which the

accident occurred.

The facts, as culled from the pleadings, deposition testimony and photograph, are as follows: On the morning of August 12, 2011, after visiting a "liver clinic," plaintiff left the subway at 149th Street, Bronx, New York, to get something to eat. The weather was good. Sometime between 10:00A.M. and 12:00 P.M., plaintiff visited the subject restaurant, which was nearby. Popeye's and Burger King are adjacent to each other, occupying different levels, Popeye's in an elevated level on one side, and Burger King in the lower level on the other side. Access to Burger King is obtained by going through Popeye's elevated level, and down two steps. The steps had a handrail on the descending right side of the steps.

Plaintiff bought a full tray of food at Popeye's. However, there was no available seating on the Popeye's side of the restaurant. At some point prior to his accident, plaintiff saw the steps, but was not sure exactly when. The tray plaintiff was carrying obscured his view of the steps. While carrying the tray in both hands, with his cane probably hooked in front of his right wrist, plaintiff made his way toward the Burger King side to find a place to sit down and eat. Plaintiff's testimony was unclear as to precisely where he slipped. Plaintiff first testified that he slipped on the steps themselves. Later, when asked where he slipped, (on the steps, in Popeye's or Burger King) he responded "At the top of the steps." As a result of his fall, plaintiff landed at ground level beyond the steps, and in the Burger King.

After his fall, plaintiff noticed that the floor, as well as the back of his pants and shirt were wet. Plaintiff also "smelled a cleaning type of agent, something that they use like Pine Sol or whatever that is, a detergent..." Prior or subsequent to his fall, plaintiff never saw anyone in the restaurant mopping, using a broom, emptying garbage or cleaning the area. There were no

wet floor signs or cones in the area and no one warned him that the floor was wet.

Rashid testified at his deposition that he was employed by Lal Restaurant Group, Inc. ("Lal") since 1997. Lal had five Burger King franchises, located in the Bronx, Queens and Yonkers. Rashid worked for Lal as the division supervisor for Burger King since January 16, 2012. His responsibilities were to oversee these franchises, train managers, ensure store compliance with various rules and regulations, and provide day to day support for management teams and stores. Lal owned several different types of franchises, such as Dunkin' Donuts, Baskin-Robbins and Popeye's. Four of five restaurants in his division have Popeye's restaurants adjacent to them, including the restaurant at which plaintiff's accident occurred. Rashid did not know what kind of training Popeye's employees received, but there was no joint training.

According to Rashid, cleaning supplies for the restaurant are kept in the back of the store. They include two mops, a bucket, and floor cleaning solution. Rashid did not know what type of cleaning solution Popeye's used. However, Rashid testified that the floor cleaners utilized by the restaurants do not contain any scent or smell. The normal procedure for cleaning the dining area of the restaurant is to place caution cones in the area that is to be cleaned, then to sweep the floor and mop it. These cleaning procedures were instituted as needed, but typically on a fifteen minute to one half hour basis. Typically, when they were not busy with customers, checking of the area and cleaning was done every thirty minutes. When they were busy, visual checks and cleaning were done every fifteen minutes. When asked if he knew the name of the manager at the time of plaintiff's fall, Rashid responded, "I don't have any idea, because I was not there."

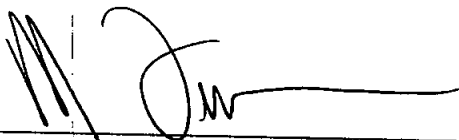
Defendants failed to establish that they did not cause or create the complained of hazardous condition. Rashid's testimony established that there was a cleaning schedule.

However, no evidence was proffered as to whether the cleaning schedule was followed on the day of plaintiff's accident, or when the area where plaintiff fell was last cleaned or inspected. *Garcia v. 1265 Morrison LLC*, 122 A.D.3d 512 (1st Dept. 2014); *Seleznyov v. New York City Trans. Auth.*, 113 A.D.3d 497 (1st Dept. 2014); *Gautier v. 941 Intervale Realty LLC*, 108 A.D.3d 481 (1st Dept. 2013). Further, plaintiff's testimony that the area where he fell was wet, together with his detection of a smell of a cleaning agent, like Pine Sol, provides a non-speculative basis for his version of the accident and sufficiently establishes a nexus between the hazardous condition and the circumstances of his fall.

Defendants Burger King's and Popeye's motion for summary judgment is denied in its entirety.

The foregoing constitutes the Decision and order of the Court.

Dated: 5/6/15


MARK FRIEDLANDER, J.S.C.