Djallo v Jacob Rest. Corp.
2015 NY Slip Op 31967(U)
October 21, 2015
Supreme Court, New York County
Docket Number: 157598/2013
Judge: Shlomo S. Hagler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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CIZA DJALLO,

Plaintiff,

Index No. 157598/2013

-against-

JACOB RESTAURANT CORP. and RACHID ARONA NIANG,

DECISION/ORDER

Defendants.

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HON. SHLOMO S. HAGLER, J.S.C.:

In this personal injury action, defendant Jacob Restaurant Corp. ("defendant" or "Jacob Restaurant") moves for summary judgment, pursuant to CPLR 3212, dismissing the complaint. Plaintiff Ciza Djallo ("plaintiff" or "Djallo") opposes the motion.[1]

BACKGROUND

Plaintiff alleges that on December 8, 2012, at 8 p.m., he was in a restaurant located at 2695 Eighth Avenue, New York, New York (the "Restaurant"), obtaining dinner for himself (Bill of Particulars, at ¶1; Plaintiff EBT at 33, 38-39). The Restaurant was owned and operated by defendant (Answer, at ¶ 2). Plaintiff avers that, after placing his tray of food on a table, he returned from washing his hands and slipped and fell in the

[1] Plaintiff's complaint was discontinued against defendant Rachid Arona Niang by stipulation dated October 25, 2013.

Restaurant (Bill of Particulars, at ¶¶ 2-3, 14-15; Plaintiff EBT at 41, 43-45, 51, 128-132). Djallo further states that, after his fall, his clothes were wet and stained (Plaintiff EBT at 49, 72-73; Plaintiff's affidavit in opposition to the summary judgment motion, sworn to on May 26, 2015 [Plaintiff Aff.], at 1). Plaintiff asserts that his fall was due to "an accumulation of a wet slippery substance and/or water on the floor [of the Restaurant]" (Bill of Particulars, at 14-15, 18). However, plaintiff now alleges that "it was this grease/oil condition that caused [him] to fall." (Plaintiff Aff., at 1).

ARGUMENTS

Defendant argues that there was no dangerous condition of wetness or debris on the floor of the Restaurant. It presents the affidavit of David Taylor ("Taylor"), its general manager, who states that he would conduct inspections or "walkthroughs" of the Restaurant approximately four times per hour to see if there was any debris, water or garbage on the floor that needed to be cleaned up (Taylor Affidavit, sworn to on March 2, 2015 ["Taylor Aff.], at ¶ 7). Taylor also stated that he was at the Restaurant on December 8, 2012, the day of plaintiff's accident, and that he had inspected the area where plaintiff fell "approximately twenty minutes prior to the accident [and he] did not observe anything on the [floor]" (*id.*, ¶¶ 6, 10). He further stated that there had been no complaints "about any foreign substances on the

floor" between the time of his inspection and plaintiff's accident (*id.*, ¶ 10).

Defendant also presented the testimony of another customer, Katrina Gordon ("Gordon"), who was present at the Restaurant at the time of the accident (Gordon EBT at 10, 18, 25, 55). She also stated that there was neither water nor debris in the area where plaintiff fell before the accident (*id.* at 17, 20, 25-26, 40-41). Gordon further stated that she saw plaintiff carrying a pitcher of water and that, after he fell, there was water on the floor from the pitcher (*id.* at 21-26, 38). Defendant also notes that, in his deposition, plaintiff stated that he did not know why he fell (plaintiff EBT at 47-48, 57) and that he had not seen if the floor was wet prior to his fall (*id.* at 50, 73). Defendant seeks dismissal of plaintiff's complaint based upon lack of a dangerous condition and lack of notice.

Plaintiff states that he fell due to the purportedly wet slippery condition of the floor (Plaintiff Aff. at 1). He argues that there must have been a greasy dangerous condition that caused him to fall and, therefore, there is a factual dispute warranting denial of defendant's motion.

SUMMARY JUDGMENT

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of

any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In deciding the motion, this Court must draw all reasonable inferences in favor of the non-moving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]).

PREMISES LIABILITY

Generally, a landowner must act as a reasonably prudent person in maintaining its property in a reasonably safe condition under all the circumstances, including the likelihood of injury, the potential seriousness of injury and the burden of avoiding the risk (*Peralta v Henriquez*, 100 NY2d 139, 144 [2003]). Additionally, in order to be held liable, a party must be aware of the alleged defective or dangerous condition, either through having created it, actual knowledge of the condition or constructive notice of it through the defect's visibility for a sufficient amount of time prior to the accident to enable a

defendant to discover and remedy it (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). "A defendant moving for summary judgment in a slip-and-fall action has the initial burden of showing that it neither created, nor had actual or constructive notice of the dangerous condition that caused plaintiff's injury" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]; *Amendola v City of New York*, 89 AD3d 775, 775 [2d Dept 2011]; *Schiano v Mijul, Inc.*, 79 AD3d 726, 726 [2d Dept 2010]).

Moreover, "a defendant is entitled to summary judgment as a matter of law when a plaintiff provides testimony that he or she is unable to identify the defect that caused his or her injury" (*Siegel v City of New York*, 86 AD3d 452, 454 [1st Dept 2011]; *see also Smith v City of New York*, 91 AD3d 456, 456-457 [1st Dept 2012], *lv denied* 21 NY3d 858 [2013]).

DISCUSSION

In this case, defendant presented the evidence of its manager, Taylor, who stated that he had inspected the area where plaintiff fell "approximately twenty minutes" before plaintiff fell and he "did not observe anything on the [floor]" (Taylor Aff., at ¶¶ 6, 10). In addition, defendant presented the testimony of a customer, Gordon, who also stated that there was neither water nor debris in the area where plaintiff fell immediately before the accident (*Gordon EBT* at 17, 20, 25-26, 40-

41). The above presentation is sufficient to meet defendant's "initial burden of showing that it neither created, nor had actual or constructive notice of the dangerous condition that caused plaintiff's injury" (*Ross*, 86 AD3d at 421; *see also Green v Gracie Muse Rest. Corp.*, 105 AD3d 578, 578 [1st Dept 2013]; *cf. Jahn v SH Entertinment, LLC*, 117 AD3d 473, 473 [1st 2014], where summary judgment was denied because the owner "did not state how often he inspected the floor or that he . . . inspected the accident location prior to the accident.").

In opposition to the motion, plaintiff has not presented any evidence controverting this showing that the accident location was inspected and found to be without any dangerous condition. Specifically, there is no evidence that there was a wet or greasy substance which defendant had actual or constructive notice of on the floor of the Restaurant prior to his fall. In fact, Gordon testified that the area where plaintiff allegedly fell was "bone dry" and that there was no garbage or debris in the area prior to plaintiff's fall (Gordon EBT at 17, 20, 25-26, 40-41). While Gordon states that she did not see how the accident occurred, she confirmed that "there was nothing in the area [prior to the fall] because I was just there ..." (*id.* at 46).

Plaintiff merely argues there is a reasonable inference of a greasy dangerous condition that caused him to fall in the area surrounding the placement of the water pitchers and bathroom.

This is sheer speculation because plaintiff now clearly alleges that "it was this grease/oil condition that caused [him] to fall." (Plaintiff Aff., at 1), and not water emanating from the pitchers or bathroom. Even if plaintiff changed his position that it was the water that caused his fall, that argument would be unavailing because both Taylor and Gordon confirmed that the area that he allegedly fell was dry just a few minutes prior to the accident. This appears to foreclose the possibility that defendant had actual knowledge of the condition or constructive notice of it for a sufficient amount of time prior to the accident to enable the defendant to discover and remedy it (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

CONCLUSION

Accordingly, it is,

ORDERED the motion of defendant Jacob Restaurant Corp. for summary judgment dismissing the complaint of plaintiff Ciza Djallo is granted; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: October 21, 2015

E N T E R: