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EA 7/17/15 FE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DORIS LING-COHAN PART 36

Justice

Index Number : 101142/2012
KARP, DONNA
vs.
L'OREAL USA
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for Summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits (& memo) | No(s). 1, 2

Answering Affidavits — Exhibits (& memo) | No(s). 3

Replying Affidavits | No(s). 4

Upon the foregoing papers, it is ordered that this motion is by defendants for summary judgment is denied in accordance with the attached memorandum decision.

RECEIVED
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NYS SUPREME COURT - CIVIL

FILED
JUL 17 2015
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 7-16-15

HON. DORIS LING-COHAN, 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

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

---------- X

DONNA KARP and GEORGE KARP,

Index No. 101142/2012

Plaintiffs,

- against-

L'OREAL USA, INC., L'OREAL USA CREATIVE, INC., L'OREAL USA PRODUCTS, INC., and L'OREAL TECHNICAL CENTER,

DECISION AND ORDER

Motion Seq. No.: 001

Defendants.

---------- X

DORIS LING-COHAN, J.S.C.:

In this action seeking damages for personal injury, defendants, L'Oreal USA, Inc., L'Oreal USA Creative, Inc., L'Oreal USA Products, Inc., and L'Oreal Technical Center, (collectively, L'Oreal) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

Plaintiff Donna Karp (plaintiff)[1] alleges that she suffered personal injuries on August 31, 2011, when she fell from a hydraulic beautician's chair in a salon operated by defendant L'Oreal Technical Center, at 575 Fifth Ave, in Manhattan. At the time of the incident, plaintiff was a customer undergoing a free hair treatment that involved product testing. Plaintiff had been a patron of the facility for more than 20 years.

In support of their motion, defendants submit the affirmation of their counsel, Margot Willensky, annexing excerpts

[1] Plaintiff George Karp asserts a derivative claim for loss of services.

of the deposition testimony of Julia Youseff (Youseff, *id.*, exhibit E), a L'Oreal vice-president and the director of the technical center, and Alexis Rosati (Rosati, *id.*, exhibit F), one of the two licensed cosmeticians who applied the dye being tested to plaintiff's hair, and the deposition testimony of plaintiff. The Willensky affirmation also annexes the pleadings, the bill of particulars, and a video of the premises (*id.*, exhibit G), that captures plaintiff's fall. The other cosmetician, Roxanne Rodriguez (Rodriguez), who no longer works for L'Oreal, has not submitted any affidavit or been deposed.

Plaintiff testified at her deposition (exhibit D to Willensky affirmation) that the chair was not too high for her when she first mounted it, but "for the two of them to work on me, they had to raise me" (*id.* exhibit D, at 52). Rosati and Rodriguez attended to plaintiff and applied the dye. Rodriguez is taller than Rosati (Willensky Affirmation, exhibit F, at 21). Rosati testified at her deposition that she is less than five feet tall, and does not raise the height of the chair (*id.*, at 17).

After applying the dye, the two cosmeticians left plaintiff alone in the chair. Plaintiff felt a burning irritation on her scalp and climbed out of the chair to inform the cosmeticians. Plaintiff then asked them to lower the chair (*id.*, exhibit D at 50). The cosmeticians told plaintiff to wait another 15 or 20

minutes and did not lower the chair (*id.*, at 51). Plaintiff returned to the chair (id., at 52.

Plaintiff attempted to blot her forehead because the dye was running down her forehead and the fumes were getting in her eyes and throat (Karp aff, ¶ 12). She thought she might need medical attention for her scalp (Karp aff, ¶ 14). Still bothered by the irritation, she again attempted to get out of the chair (*id.*). She tried to swivel the chair to the right, in the direction of the room where the cosmeticians were (*id.*). As she attempted to exit the chair, she had difficulty seeing because the dye was dripping into her eyes (*id.*, ¶ 14). Her left foot got tangled up with the footrest and she fell onto the floor, landing on her left shoulder and outstretched arm (Karp dep. at 54-55, 59-60). Plaintiff was hospitalized, and the x-rays showed that she had three broken bones (*id.* at 70-71, 76). There is no allegation that the chair was defective or malfunctioned in any way.

The threshold issue, which is one of law for the court, is the existence of a legal duty owed by defendants to plaintiff (*see Darby v Compagnie Natl. Air France*, 96 NY2d 343, 347 [2001]). On the facts alleged, there is no allegation that the premises were not reasonably safe, but defendants could be liable to plaintiff if it is determined that they had actual or constructive notice or created a dangerous condition (*see Piacquadio v. Recine Rlty. Corp.*, 84 NY2d 967, 969 [1994];

Segretti v. Shorenstein Co., East LP, 256 AD2d 234, 235 [1st Dept 1998]).

As the Appellate Division, Second Department, states:

> "[s]tore owners are charged with the duty of keeping their premises in a reasonably safe condition for the benefit of their customers To be entitled to summary judgment, [defendants are] required to show, prima facie, that [they] maintained [their] premises in a reasonably safe condition and that [they] did not have notice of or create a dangerous condition that posed a foreseeable risk of injury to persons expected to be on the premises [internal citations omitted]"

(*Russo v Home Goods, Inc.*, 119 AD3d 924, 925 [2d Dept 2014]).

Youseff testified that the chairs are very modern; they have a footrest in the front connected to the chair by a bar, and a lever in the back to raise and lower the chair hydraulically (Youseff Dep. at 23). She testified further that the cosmeticians are supposed to keep the dye out of the patron's eyes because exposure can cause an adverse reaction (*id.* at 28). Rosati testified that she did not ever raise a chair herself, because she is under five feet tall, and would have a hard time working on the patron's hair (Rosati Dep. at 17, 33-34).

Rosati testified that Rodriguez is taller than she is (*id.* at 21). Rosati also testified that she did not know whether the chair had to be raised while she was working with Rodriguez on plaintiff's hair, and had no independent recollection whether the chair had been raised (*id.* At 33-34_. She testified that she

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could not reach a patron's hair, and therefore could not perform a test properly, if the chair were raised (*Rosati dep* . at 33-34).

The video recording (exhibit G), begins after plaintiff has been seated. Therefore it has no evidentiary value on the issue of whether one of the cosmeticians raised the chair after plaintiff was seated but before the product was applied. It has no probative value on the issue of the height of the chair from which plaintiff fell.

Defendants argue that there was no dangerous condition present, that defendants' conduct did not proximately cause the accident, and that defendants did not breach any duty owed to plaintiff. Defendants further argue that, to the extent there was a dangerous condition involving the height of the chair, it was open and obvious.

L'Oreal's argument that the condition was open and obvious is not dispositive. As the Appellate Division, Second Department, states:

> "[p]roof that a dangerous condition is open and obvious does not preclude a finding of liability against an owner for failure to maintain property in a safe condition. While such proof is relevant to the issue of the plaintiff's comparative negligence, a hazard that is open and obvious may be rendered a trap for the unwary where the condition is obscured or the plaintiff distracted. The determination of [w]hether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances, and whether a

> condition is not inherently dangerous, or constitutes a reasonably safe environment, depends on the totality of the specific facts of each case [internal citations and quotation marks omitted]"

(*Russo v Home Goods, Inc.*, 119 AD3d at 925-26).

The dangerous condition alleged was not just the elevated chair, which may be found to have been open and obvious, but, also the situation that defendants allegedly created, by directing plaintiff to return to the chair and wait, unattended, for another 15 or 20 minutes for the dye to take effect. Plaintiff states, without contradiction, that she informed the cosmeticians that her scalp was irritated. Youseff testified that the rules or guidelines of the L'Oreal Technical Center require the cosmetician to immediately wash the customer's hair and remove the dye if the customer complains of even minor itching (Youseff Dep. at 15-16).

Defendants argue in the Willensky reply affirmation that "plaintiffs have failed to point to a single piece of evidence demonstrating that the salon chair was raised by L'Oreal immediately prior to the accident" (*id.*, ¶ 6).

Plaintiff's initial duty on this motion is not to point to any evidence. The initial burden is on L'Oreal.

> "[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. Failure to make such prima facie showing

> requires a denial of the motion, regardless of the sufficiency of the opposing papers [internal citations omitted]"

(*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Under the facts of this case, to meet the initial burden on their summary judgment motion, defendants were required to submit evidence establishing as a matter of law that they did not create a dangerous condition (*see Pastore v Western Beef, Inc.*, 110 AD3d 860, 861 [2d Dept 2013]). L'Oreal has failed to meet this burden (*see Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). Therefore, it is unnecessary to consider plaintiff's submissions (*see Alvarez*, 68 NY2d at 324).

Defendants have not established as a matter of law that in the process of applying the dye, and then leaving the patron unattended, it did not create a foreseeable risk of harm to plaintiff, should her vision become impaired as a result of dye in her eyes. The presence of this issue is highlighted by the testimony of Youseff that, "sometimes there is a little bit [of dye] running, so we just put a towel over them to protect [them]" (Youseff Dep. at 27). Youseff states further that, if the dye runs down the patron's forehead, "[t]he technicians would clean it off, wipe it off" (*id.* at 28). Youseff stated the hair product was supposed to stay out of the patron's eyes because it can potentially cause an adverse reaction (*id.*).

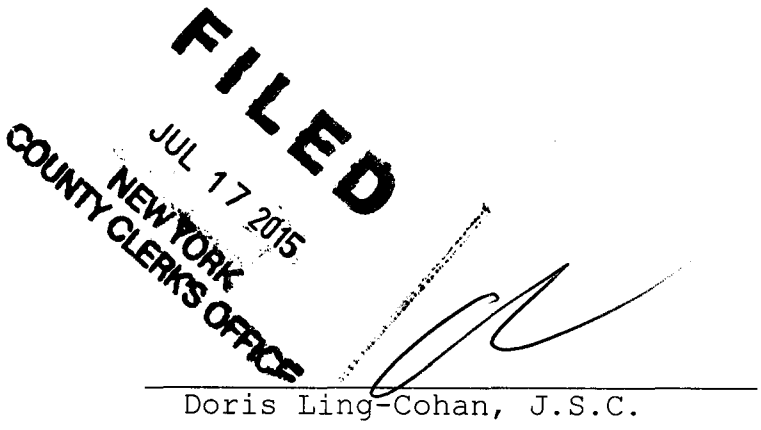
Thus, defendants have not demonstrated that no factual issue

is presented as to whether they created a dangerous condition. This conclusion is supported by the evidence that defendants left plaintiff unattended in an allegedly elevated chair, with instructions to stay there for up to 20 minutes, after she had complained of scalp irritation, knowing of the potential for dye to drip into her eyes.

Accordingly, it is

ORDERED that the motion of defendants L'Oreal USA, Inc., L'Oreal USA Creative, Inc., L'Oreal USA Products, Inc., and L'Oreal Technical Center, for summary judgment pursuant to CPLR 2212, dismissing the complaint, is denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiffs shall serve a copy upon defendants, with notice of entry.



Dated: July 16, 2015

Doris Ling-Cohan, J.S.C.

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