

Vetere v Afanasewicz
2015 NY Slip Op 32553(U)
June 5, 2015
Supreme Court, Nassau County
Docket Number: 8148/13
Judge: Margaret C. Reilly
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County Clerk

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
ALESE MARIE VETERE,**

TRIAL/IAS PART 24

Index No.: 8148/13

Motion Seq. No.: 001

Submit Date: 5/06/15

Plaintiff,

-against-

**JULIE AFANASEWICZ a/k/a JULIET AFANASEWICZ
and PETER AFANASEWICZ,**

**DECISION AND
ORDER**

Defendants.

PRESENT: HON. MARGARET C. REILLY, J.S.C.

The following papers having been read on the defendants' motion:

Plaintiff's Notice of Motion for Summary Judgment (Seq.# 001),	
Affirmation in Support & Exhibits	1
Plaintiff's Affirmation in Opposition & Exhibit	2
Defendants' Reply Affirmation	3

Upon the foregoing papers, it is ordered that the defendants' motion for summary judgment is decided as follows:

Motion by the attorneys for the defendants, Julie Afanasewicz a/k/a Juliet Afanasewicz and Peter Afanasewicz, for an order, pursuant to CPLR §3212, dismissing plaintiff Alese Marie Vetere's complaint, is **DENIED**.

In the within action, the plaintiff seeks to recover for injuries sustained as the result of an accident that is alleged to have occurred on December 11, 2011. On the date of the incident, defendants Julie Afanasewicz (defendant) and Peter Afanasewicz were not home and plaintiff was babysitting their three children. During that time, the two oldest children wanted to make Christmas ornaments using a "Make It and Bake It" craft kit that defendant had purchased. The use of an oven was required. Plaintiff burned her fingers while removing a hot pan containing the ornaments from the Afanasewicz' oven.

Plaintiff testified at her examination before trial that the "Make It and Bake It" kit was still in its packaging with instructions. Plaintiff read the instructions before she started the

project.

Plaintiff retrieved a pan, lined it with aluminum foil, placed one of the frames on top of the foil, and then had the boys place the beads in the frame. She testified that the kit came with multiple frames; however, they placed only one frame in the pan the first time. Plaintiff later explained that she only used one frame and attempted to make just one ornament at a time the first time in order to test it out to see if it came out okay before attempting to make more. The plaintiff turned on the oven by pressing a button. She could not remember nor did she notice at the time what temperature the oven was set to. She preheated the oven for three minutes, placed the pan containing one frame on a rack in the middle of the oven, closed the oven door, set a time for three minutes on her phone, and then removed the pan after the three minutes had expired. Plaintiff removed the pan without difficulty by using a potholder. She felt heat coming from the pan during this initial attempt at making just one ornament. Next, she let the ornament cool off for about two minutes before using a potholder to remove the aluminum foil from the pan.

Plaintiff and children decided to make additional crafts. This time they used either two or three frames. The frames and aluminum foil were eventually placed in the same pan that she had previously used the first time. She put the pan in the oven the same way she did the first time. Again, she set an alarm for three minutes. Prior to the three minute alarm going off, she smelled smoke. She testified that she went over to the oven, opened the oven door, and observed flames. The "Make It and Bake It" frames and beads had caught fire in the pan. She looked for a fire extinguisher but could not find one, so she turned on the sink, grabbed the potholder, and took the pan out of the oven and into the sink under water using a potholder in her right hand in order to place the pan into the sink. Despite the fact that she used a potholder, she testified that a portion of her right thumb came into contact with the pans. She burned her left as well. When she threw the pan into the sink, it only went halfway into the sink, so she used her bare left hand to push the pan completely into the sink. Defendant testified that before she left her home on the day of the incident, she left out coloring books, games and the "Make It and Bake It Bake It" kit. She bought the kit about

a month before the incident. Defendant further testified that she personally used her oven more than once a day, and that she is familiar with its controls. Other than telling the plaintiff to turn on the oven, she did not give her any specific instructions on how to use the oven in conjunction with the "Make It and Bake It" kit. Defendants' family lived in the house for six months prior to the accident. The kitchen had two ovens. During the six months that defendant was living in the house, she did not notice a difference in their respective functioning. Defendant testified that she never had an experience with the oven in question running either too hot to too cold. In order to turn on the oven, the operator had to manually turn the dial to the desired temperature. Other than the dial, there were no other controls.

The claims of the plaintiff sound in negligence and allege that the defendants failed to set their oven to the proper temperature specified for the "Make It and Bake It" kit; the defendants failed to determine the proper temperature for the safe use of the "Make It and Bake It" kit; failed to warn the plaintiff prior to her using the oven that the temperature dial was not accurate in setting and maintaining and temperature; had actual notice that the oven "ran hotter than it was set for"; and the defendants created a trap and hazard by maintaining a defective oven.

It is fundamental that to recover for negligence, a plaintiff must establish the defendant owed him or her a duty to use reasonable care, that the defendant breached the duty of care, and that the breach of such duty was a proximate cause of his or her injuries (*see Pulka v Edelman*, 40 NY2d 782, 353 N.E. 2d 1019; *Pasquaretto v Long Is. Univ.*, 106 AD3d 794; *Fox v Marshall*, 88 AD3d 131; *Solan v Great Neck Union Free School Dist.*, 43 AD3d 1035).

On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried, not to resolve it (*see Sillman v Twentieth Century Fox Films Corp.*, 3 NY2d 395, 404). A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant (*see Alvarez v Prospect Hosp.*, 68 NY2d 320; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851; *Fox v Wyeth Labs., Inc.*, 129 AD2d 611; *Royal v Brooklyn Union Gas Co.*, 122 AD2d 132). The defendant has made

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an adequate *prima facie* show of entitlement to summary judgment. Plaintiff is not able to recall the temperature the instructions indicated to which the oven should be set. Defendant testified that she did not set the oven before leaving the plaintiff with the children. Plaintiff testified that she was aware that the pan would be hot when it was to be taken out of the oven.

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form (see *Friends of Animals, Inc. v Associated Fur Mfgs., Inc.*, 46 NY2d 1065. Conclusory statements are insufficient (see *Sofsky v Rosenberg*, 163 AD2d 240, *aff'd* 76 NY2d 927; *Zuckerman v City of New York*, 49 NY2d 557; see *Indig v Finkelstein*, 23 NY2d 728; *Werner v Nelkin*, 206 AD2d 422; *Fink, Weinberger, Fredman, Berman & Lowell, P.C. v Petrides*, 80 AD2d 781, *app dismissed*. 53 NY2d 1028; *Jim-Mar Corp. v Aquatic Constr., Ltd.*, 195 AD2d 868, *lv app denied* 82 NY2d 660).

In opposition, the plaintiff contends that the defendant set the temperature on the oven before leaving the house and told the plaintiff that "the oven runs a little funny."

- Q. And what did she tell you with regard to the kit?
- A. She told me that she was setting the oven to do the project and that the oven runs a little funny, so she is going to set it to the temperature but she uses the oven all the time to make lasagne and everything's fine, so all I have to do is press, like if we are going to do it, just turn it on, turn the oven on because it is already set.
- Q. When she said she was setting it, what did she mean by setting it? Did she mean turning it on?
- A. No. She was setting the temperature to the temperature that it needed to be to do the project, and all I needed to do when we were ready was to turn the oven on, press the on button.

Moreover, plaintiff alleges defendant advised plaintiff that the oven runs hotter than

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it was set for. Absent a duty of care, there is no breach, and without a breach there can be no liability. The question of whether a defendant owes a duty of care to another person is a question of law for the courts (see *Malave v Lakeside Manor Homes for Adult*, 105 AD 3d 914, 915). Defendant had a duty to the plaintiff to provide a safe and working oven. Issue finding, rather than issue determination, is the key to summary judgment (see *In re Cuttitto Family Trust*, 10 AD3d 656; *Greco v Posillico*, 290 AD2d 532; *Gniewek v Consolidated Edison Co.*, 271 AD2d 643; *Judice v DeAngelo*, 272 AD2d 583). The Court should refrain from making credibility determinations (see *S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341; *Surdo v Albany Collision Supply, Inc.*, 8 Ad3d 655; *Greco v Posillico*, *supra*; *Petri v Half Off Cards, Inc.*, 284 AD2d 444, 445), and the papers should be scrutinized carefully in the light most favorable to the party opposing the motion (see *Glover c City of New York*, 298 AD2d 428; *Perez v Exel Logistics, Inc.*, 278 AD2d 213). There are issues of fact as to whether or not the oven was operating properly, and if not, whether defendant had actual or constructive notice of an alleged defect (see *Gordon v American Museum of Natural History*, 67 NY2d 836) and further, whether defendant made an admission to plaintiff regarding the condition of the oven (see *Gangi v Fradus*, 227 NY 452, 456).

In view of the foregoing, defendants' motion for summary judgment is **DENIED**.

This constitutes the Decision and Order of this Court.

Dated: June 5, 2015
Mineola, New York

ENTER:



HON. MARGARET C. REILLY, J.S.C.

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