

Echevarria v Western Beef, Inc.
2016 NY Slip Op 30681(U)
March 10, 2016
Supreme Court, Bronx County
Docket Number: 308123/12
Judge: Wilma Guzman
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX**

Index No. 308123/12
Motion Calendar No. 5
Motion Date: 12/14/15

JASMINE ECHEVARRIA,
Plaintiff,

-against-

DECISION/ORDER
Present
Hon. Wilma Guzman
Justice Supreme Court

WESTERN BEEF, INC.,

Defendant.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion to dismiss the plaintiff's complaint

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation in Support, and Exhibits thereto.....	1
Affirmation in Opposition of Motion and Exhibits thereto	2
Reply Affirmation	3

Upon the foregoing papers and after due deliberation, following oral argument, the Decision/Order on this motion is as follows:

Defendant moves this Court for an Order granting summary judgment and dismissing the plaintiff's complaint. Plaintiff submitted written opposition.

Plaintiff commenced this action seeking damages for personal injuries allegedly sustained when a bottle burst in her hands as she held it.

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issues of fact and the right to judgment as a matter of law. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986) and Winegrad v. New York University Medical Center, 64 N.Y.2d 851 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in Court. Therefore, the party opposing a motion for summary judgment is entitled to all

favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to non-moving party. *See, Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dept., 1989). It is well settled that issue finding, not issue determination, is the key to summary judgment. *See, Rose v. Da Ecib USA*, 259 A.D.2d 258 (1st Dept., 1999). Summary judgment will only be granted if there are no material, triable issues of fact. *See, Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957).

Defendant argues in the motion for summary judgment, that no liability exists as it did not create the allegedly dangerous condition nor did it have actual or constructive notice of the allegedly dangerous condition.

Plaintiff testified that she was at Western Beef on Prospect Avenue, in the Bronx when she reached for a ten bottle pack of malt dink known as "Malta" which was packaged in cardboard. The cardboard had two cutout for the fingers to be inserted during lifting. The bottle packs were stacked one on top of the other. She did not observe any liquid in the area. As she lifted the Malta package into the shopping cart she placed one hand underneath the package. She heard a popping sound and noticed that the Malta was dripping and blood was coming from her hand. The glass had broken and cut her right hand.

Tonisha Mimms testified on behalf of Western Beef. She is the "Front End" in charge of the cashiers. On the date of the plaintiff's accident she was acting as bookkeeper and filled out the incident report. The Store Manager at that time was Carmelo Leon who at the time of deposition was still employed as the store manager. She did not know if there were stock people at Western Beef. She did not know how stock was transferred from the stock room to the store shelves.

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law. *See, Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (NY 1986) and *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (NY 1985). Summary judgment is a drastic remedy that deprives a litigant of his day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be submitted from the evidence submitted and the papers will be scrutinized in a light most favorable to the non-moving party. *See, Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520, 544 N.Y.S.2d 834 (1st Dept. 1989). It is well settled that

issue finding, not issue determination, is the key to summary judgment. *See, Rose v. Da Ecib USA*, 259 A.D.2d 258, 686 N.Y.S.2d 19 (1st Dept. 1999). Summary judgment will only be granted if triable issues of fact are non-existent. *See, Ruzycki v. Baker* 301 A.D.2d 48; 750 N.Y.S.2d 680 (1st Dept. 2002)

To establish a claim on the grounds of Res Ipsa Loquitor, a plaintiff must establish the following criteria: (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff (See *Dermatossian v. New York City Transit Authority*, 67 N.Y.2d 219; 492 N.E.2d 1200; 501 N.Y.S.2d 784 (1986).

“The doctrine of res ipsa loquitor is not applicable where it is at least equally probable that the negligence involved was that of someone other than the defendant.” *Gallagher v. Melmarkets, Inc.*, 174 A.D.2d 647 (2nd Dept. 1991). In the instant case, plaintiff’s opposition relies upon the doctrine of res ipsa loquitor. However, plaintiff has failed to raise a triable issue of fact. The bottle which plaintiff herself testified was packaged inside the cardboard box and broke therein cannot be said to be in the exclusive control of defendant Western Beef as plaintiff has not shown that the defendant was the company that packaged said Malta. Furthermore, the package could have been accessed by any other customer. *De Simone v. Inserra Supermarkets, Inc.*, 207 A.d.2d 615 (3rd Dept. 1994).

Defendant has met the prima facie burden for summary judgment. Plaintiff has failed to offer any proof sufficient to raise a triable issue of fact as she offers only speculation that the defendant caused or created the hazardous condition or had notice of such. *See, Smith v. Costco Wholesale Corp.*, 50 A.D.3d 499 (1st Dept. 2008); *Garcia v. Morrison*, 122 A.D3d 512 (1st Dept. 2014); *Rich v. Twin Parks Northeast Associates, LP*, 117 A.D3d 482 (1st Dept. 2014).

Furthermore, plaintiff has failed to offer any proof sufficient to raise a triable issue of fact as she offers only speculation that the defendant caused or created the hazardous condition or had notice of such. *Jamie v. Ryder*, 289 A.D.2d 387 (2nd Dept. 2000)*Licaste v. Waldbaums, Inc.*, 277 A.D.2d 429 (2nd Dept. 2000) *See, Smith v. Costco Wholesale Corp.*, 50 A.D.3d 499 (1st Dept. 2008); *Garcia v. Morrison*, 122 A.D3d 512 (1st Dept. 2014); *Rich v. Twin Parks Northeast Associates, LP*,

117 A.D3d 482 (1st Dept. 2014).

Accordingly, it is

ORDERED that defendant Western Beef's motion for summary judgment is hereby granted and the plaintiff's complaint dismissed. It is further

ORDERED that defendants shall serve a copy of this Order with Notice of Entry upon plaintiff within thirty (30) days of entry of the Order.

This constitutes the decision and order of this Court.

DATE

3/10/16



HON. WILMA GUZMAN, JSC.