

Kurcias v 1043 Rest. Corp.
2016 NY Slip Op 31956(U)
October 14, 2016
Supreme Court, New York County
Docket Number: 158267/13
Judge: Jennifer G. Schechter
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 57

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 LISA KURCIAS and ALLAN GARCIA,

DECISION AND ORDER

Index No. 158267/13

Plaintiffs,

-against-

1043 REST. CORP. and "JOHN DOE",

Defendants,

-----x
 JENNIFER G. SCHECTER, J.:

Pursuant to CPLR 3212, defendant 1043 Rest. Corp. (1043), which owns and operates Angelo's--an Italian restaurant, moves for summary judgment. Plaintiffs Lisa Kurcias and her husband Allan Garcia oppose the motion. The motion is denied.

Background

On April 12, 2013, Lisa Kurcias was injured after a bicycle deliveryman struck her while she was crossing the street. Kurcias did not see the bicycle coming at her before she was hit. Just before the accident, she heard a male voice yelling and she saw the basket of the bicycle for a millisecond as she was hit (Affirmation in Support [Supp], Ex C [Kurcias EBT] at 25-27). Kurcias recalls that the bicyclist was Hispanic or Latin and that the bike had a straight handle

(Kurcias EBT at 32, 34). She was not paying attention to the bicycle itself (Kurcias EBT at 34).

Immediately after the incident, Kurcias spoke to the bicyclist who stated "Wow, you are really hurt" (Kurcias EBT at 39). She described the bicyclist as approximately 25 to 35 years old, about 5'4-5'5 tall and wearing a sweatshirt, jeans and helmet (Kurcias EBT at 40, 42). She did not notice anything else. She subsequently observed an Angelo's employee come outside and speak to the man who hit her and the bicyclist then left the scene (Kurcias EBT at 49-50).

About five or ten minutes after the accident, Kurcias went to Angelo's where the bartender offered her ice for her hand (Kurcias EBT at 48).

Two weeks later, Kurcias returned to Angelo's and spoke with the manager. She told him that she wanted to get the bicyclist's name and was asked "didn't you already get it" (Kurcias EBT at 52). When she responded in the negative, she was told "we don't know anything" (*id.*).

Approximately six weeks later, near the same intersection as the accident, Kurcias saw the bicyclist again, riding a similar bicycle "that looked the same as" the one that hit her. She saw that he was wearing an orange vest that said "Angelo's" on the back (Kurcias EBT at 43-45).

1043 moves for summary judgment arguing that the action should be dismissed as three of the five or six delivery people, who were the only delivery personnel deposed, as well as other Angelo's employees had no knowledge about the incident and Kurcias is unable to show that the person who hit her was an Angelo's employee (Supp at ¶¶ 27, 31, 36, 38, 42, 43, 47, 48-49, 52, 57-58, 61, 67 and 77).

Analysis

Summary Judgment is a drastic remedy that should not be granted if there is any doubt as to the existence of material triable issues (see *Glick & Dolleck v Tri-Pac Export Corp*, 22 NY2d 439, 441 [1968] [denial of summary judgment appropriate where an issue is "arguable"]; *Sosa v 46th Street Develop. LLC*, 101 AD3d 490, 493 [1st Dept 2012]). The burden, which is "a heavy one," is on the movant to make a *prima facie* showing of entitlement to judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any disputed material facts (see *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). "Where the moving party fails to meet this burden, summary judgment cannot be granted, and the non-moving party bears no burden to otherwise persuade the Court against summary judgment. Indeed, the moving party's failure to make

a *prima facie* showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*).

1043 urges that "plaintiffs have failed in proving that Kurcias' alleged accident was caused by 1043, let alone related to 1043" (Supp at ¶ 77). It misses the mark. A defendant moving for summary cannot merely point to gaps in plaintiffs' proof (see *Torres v Merrill Lynch Purch.*, 95 AD3d 741, 742 [1st Dept 2012]; see also *Ricci v A.O. Smith Water Prods. Co.*, ___ AD3d ___, 2016 NY Slip Op 06741 [1st Dept 2016] [in support of motion defendant "merely pointed to perceived gaps in plaintiff's proof, rather than submitting evidence showing why" plaintiff's claims failed]; *Belgium v Mateo Prods., Inc.*, 138 AD3d 479, 480 [1st Dept 2016] [evidentiary gaps do not equate to meeting a movant's burden]; *McCullough v One Bryant Park*, 132 AD3d 491, 492 [1st Dept 2015] [defendant cannot meet burden "merely by pointing to gaps in plaintiff's proof"])). It must affirmatively demonstrate its lack of liability and 1043 failed to do so here. For example, only three of the five or six delivery people were deposed (see Reply at 5). That begs the question of whether the offending bicyclist could have been one of the other delivery people and 1043, which has the heavy burden

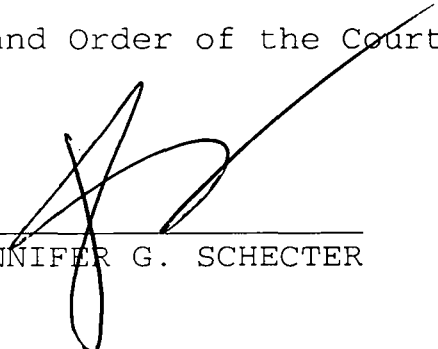
here, never submitted evidence that the deliverymen that were not deposed did not fit Kurcias' description.

Certainly, if a jury finds that plaintiffs have not proven their case, 1043 will prevail after trial. It is ultimately up to a jury, however, to determine issues including whether to credit Kurcias' testimony that the bicyclist that she saw wearing an Angelo's vest weeks after the accident was the very same man that struck her and told her that she was "really hurt" and whether 1043 has no knowledge of the cause of the accident as it maintains.

Accordingly, it is ORDERED the defendant's motion for summary judgment is denied.

This constitutes the Decision and Order of the Court.

Dated: October 14, 2016



HON. JENNIFER G. SCHECTER