Danis v Mcdonald's Rest.
2018 NY Slip Op 32437(U)
September 27, 2018
Supreme Court, New York County
Docket Number: 150098/2012
Judge: Lisa A. Sokoloff

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 21

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MARK JOSEPH DANIS,

Plaintiff,

-against-

DECISION AND ORDER

Index # 150098/2012

Mot. Seq. 3 & 4

MCDONALD'S RESTAURANT, NEW YORK CITY TRANSIT AUTHORITY, THE METROPOLITAN TRANSPORTATION AUTHORITY AND "JOHN" DOE" who is intended to be train operator.

Defendants.

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered	NYCEF #
Defendant's Motion/Affirmation	1	40-53
Plaintiff's Opposition	2	54-58
Co-Defendant's Opposition	3	62-63
Defendant's Motion/Affirmation	4	66-74
Plaintiff's Opposition	5	80-84

LISA A. SOKOLOFF, J.

In this personal injury action, Plaintiff Mark Joseph Danis alleges that food he ate at a McDonald's Restaurant (McDonald's) owned by Defendant John C. Food Corp. ("John Food"), incorrectly sued as McDonald's, was the proximate cause of food poisoning that caused him to fall on the "A" train platform at 34th Street Penn Station, operated by Defendants New York City Transit Authority and The Metropolitan Transportation Authority (collectively, "Transit").

Plaintiff asserts a negligence cause of action against Transit and negligence, breach of warranty and strict product liability causes of action against Defendant John Food claiming that the McDonald's food was defective at the time it left the control of John Food in that it contained

a "dangerous pathogen" and, as expected and intended, was consumed by Plaintiff and was the proximate cause of Plaintiff's accident and injuries.

In motion sequence number 3, Defendant, John Food moves for summary judgment dismissing Plaintiff's amended complaint and all cross-claims against it on the ground that the food was not the proximate cause of Plaintiff's accident and injuries. In motion sequence number 4, Defendant Transit moves for summary judgment dismissing Plaintiff's complaint and all cross-claims against them on the ground that Plaintiff has failed to state a cause of action and there is no triable issue of fact.

Plaintiff alleges that on, January 13, 2011, between 1:00 and 2:00 p.m., he went to lunch with his co-worker, Hillary Hall, at the McDonald's located at 280 Madison Avenue where they both ate the "Southern Style Chicken Sandwich." Plaintiff claims he ate no other food that day, other than at McDonald's. After work, at approximately 7:00 p.m., Plaintiff attended a church event on 145th Street, where he began to feel nauseous and clammy and experienced quick variations in his body temperature. When the event ended, Plaintiff took the "A" train to go home.

On the crowded train, Plaintiff felt very sick and tried to contain what he thought would be explosive diarrhea. Plaintiff exited the train at 34th Street Penn Station intending to take a bus across town or cab to his home. Feeling dizzy, lightheaded, hot and cold, he held on to a railing by the exit stairwell, to bend his knees and take deep breaths of the cold air. Thinking he was feeling better, Plaintiff got up to exit, but collapsed on the train platform, landing on his back with his left leg over his right, extended beyond the platform. Plaintiff briefly lost consciousness, but alleges when the train began to move, he realized his left leg was caught in the cables linking the subway cars. As he tried to extricate his legs, the train kept moving and Plaintiff sustained serious and permanent personal injuries.

Like Plaintiff, his co-worker Ms. Hall, upon returning to work, began to feel sick and left work early, at approximately 4 p.m., because she had a stomach ache and felt nauseous. She took a cab home rather than a bus because she feared she might vomit, have diarrhea and/or pass out. At home that evening, Ms. Hall did in fact vomit twice, experience diarrhea twice, felt weak and experienced soreness in her neck. Her symptoms persisted for approximately six hours.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Andre v Pomeroy*, 35 NY2d 361[1974]; *Birnbaum v Hyman*, 43 AD3d 374 [1st Dept 2007]). A party moving for summary judgment must demonstrate that "the cause of action or defense" is "established sufficiently to warrant the court as a matter of law in directing judgment" in the moving party's favor (CPLR 3212 [b]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824 [2014]). Thus, a party moving for summary judgment 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 (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]. Once this showing has been made, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]. All of the evidence submitted on a motion for summary judgment is construed in the light most favorable to the opponent of the motion (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931 [2007]; *People ex rel. Cuomo v Greenberg*, 95 AD3d 474 [1st Dept 2012]).

Defendant John Food contends that Plaintiff's allegations are entirely speculative as he has no evidence to support his allegation that the chicken sandwich was contaminated. In support of its motion, John Food submitted a food safety checklist which indicates that, on the day Plaintiff ate at McDonald's, samples of the chicken were cooked to a specified temperature in accordance with USDA standards. According to Brunilda Martinex, the Director of Operation for seven McDonald's franchises, including Defendant's, testified regarding a number of safety procedures followed at the McDonald's, including the training of workers in food-handling safety, checking the temperature of both the cooked chicken and the holding cabinet where the cooked chicken is kept until served, wearing blue gloves to cook the chicken and discarding them after each use, and an hourly reminder to workers to wash hands. While McDonald's food-handling procedures are evidence of safe practices, however, they do not demonstrate conclusively that Plaintiff's sandwich was not contaminated.

In a case involving food poisoning, Plaintiff has the burden of proving that his symptoms resulted from consuming contaminated food (*Valenti v Great Atlantic & Pacific Tea Co.*, 207 AD2d 340 [2d Dept 1994]) and that his injury was causally related to the food poisoning (*Williams v White Castle Systems, Inc.*, 4 AD3d 161 [1st Dept 2004]). However, the burden of proof for trial plays no part in the assessment of whether there are relevant factual issues presented on a motion for summary judgment (*Collado v Jiacono*, 126 AD3d 927 [2nd Dept 2015]). Plaintiff must show both that the food in question was contaminated and that the illness from which he suffered was causally related to the food consumed (*Williams v White Castle Systems, Inc.*, 4 AD3d 161, 162 [1st Dept 2004]).

In *Payano v Hempstead Union Free School District* , 54 AD3d 322 [2nd Dept 2008]), a school district was granted summary judgment in an action brought by a student who was hospitalized after she allegedly developed salmonella poisoning after consuming tainted chicken

nuggets in the school cafeteria, alleging that the district was negligent in controlling, inspecting, and operating the cafeteria. The School District established its entitlement to judgment as matter of law by submitting the testimony of its director of food services and of its head cook describing the district's food handling procedures and establishing that no other students were diagnosed with salmonella poisoning in the relevant time period. In contrast, Plaintiff has submitted the deposition testimony of his colleague who consumed the same meal and reported the same symptoms as Plaintiff in the relevant time period.

The report of Dr. Dennis Miller, an infectious disease doctor at Bellevue Hospital, included in Defendant John Food's submission is inconclusive. Dr. Miller reviewed Plaintiff's medical records from Bellevue and NYU Hospitals, which included references to Plaintiff having had food poisoning at the time of his accident, but no toxicology reports or stool cultures. In reviewing Plaintiff's deposition testimony, Dr. Miller noted that Plaintiff's colleague ate the same meal as Plaintiff and left work early that day feeling sick, but that there was no evidence that she became ill with gastroenteritis or mention of specific complaints. Significantly, Dr. Miller was not provided with Ms. Hall's deposition wherein she identified symptoms identical to Plaintiff's occurring within a similar timeframe.

According to Dr. Miller's report, most bacterial gastrointestinal illnesses have longer incubation periods than the 5-6 hours reported by Plaintiff, even up to several days. He therefore did not perceive any clear connection between Plaintiff's meal at McDonald's and his illness. Because Dr. Miller's report is unsworn and fails to comply with CPLR § 2106 which requires a physician's statement to be "affirmed ... to be true under the penalties of perjury" (*Offman v Singh*, 27 AD3d 284 [1st Dept 2006]), it is not in admissible form (*Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065 [1979]) and may not be considered.

Plaintiff submitted two letters from gastroenterologist, Mordecai A. Dicker, stating that toxins may be transmitted from food handlers to the recipients when sanitary conditions are not well controlled, and that Plaintiff's symptoms were more likely than not food poisoning because he had not eaten anything else that day, his symptoms were temporally related to his meal at McDonald's, and the symptoms were classic for food poisoning.

While these letters may not be considered as they, too, fail to comply with CPLR § 2106 and therefore do not meet the test of admissible medical evidence (*Grasso v Angerami*, 79 NY2d 813 [1991]; *Migliaccio v Miruku*, 56 AD3d 393 [2008]), they may be considered along with admissible evidence to defeat a summary judgment motion (*Zimbler v Resnick 72nd St Assoc.*, 79 AD3d 620 [1st Dept 2010]. Coupled with Ms. Hall's deposition testimony that after eating the same meal as Plaintiff at McDonald's, she experienced the same symptoms of food poisoning within the same time frame, and viewing the evidence in the light most favorable to Plaintiff, whether Plaintiff's symptoms were causally related to his meal at McDonalds is a question of fact for the jury.

In support of its motion, Defendant Transit submits the EBT of Cleavie Jordan, the train conductor on the "A" train on the evening of Plaintiff's accident. Mr. Jordan testified that there is a procedure in place, which he followed on the day of the accident, to ensure a train is fully stopped at the correct location and the safe movement of passengers on and off the train. He presses a button to open the doors and makes an announcement while passengers enter and exit the train. Before the train leaves the station, he leans his head out the window of his car, views the back cars to ensure it is safe to close the doors, then closes the rear section and waits for the red light indicating closure. Then he turns to view the front cars to make sure no one is entering or leaving the train, closes the front doors when it is safe to do so, and waits for a second indication light that the train is fully closed. Subway doors typically remain open for

approximately 10 seconds. He then views the 75-foot platform front and back before turning the key that will indicate to the train operator that it is safe to proceed.

Mr. Jordan testified that, on the evening of the accident, he did not recall seeing anyone laying down on the platform before the train started moving. He did not learn of Plaintiff's accident until the subway reached Schermerhorn Street in Brooklyn where he was told the train would be taken out of service at Utica Avenue.

To establish a *prima facie* case against Transit, plaintiff must establish (1) the existence of a duty on their part to plaintiff; (2) a breach of that duty; and (3) that such breach was a substantial cause of the resulting injury (*Merino v New York City Transit Authority*, 89 NY2d 824 [1996]. "A common carrier owes a duty to an alighting passenger to stop at a place where the passenger may safely disembark and leave the area" (*Miller v Fernan*, 73 NY2d 844 [1988]; *Malawer v New York City Transit Authority*, 18 AD3d 293 [1st Dept 2005]).

According to his EBT, Plaintiff safely exited the subway and at least a few seconds passed while he paused holding onto the railing. Plaintiff recalled that the train was already moving when he fell on the platform, thought he lost consciousness, woke to find his legs caught in the cables, and recalled that the train continued to move as he extricated himself although he was not dragged down the platform. No one was near Plaintiff when he started to scream for help.

In opposition to Transit's motion, Plaintiff summarily asserts, without any factual basis, the failures on the part of Transit, including failing to notify riders of the potential dangers of using rail transportation and failing to use reasonable measures to ensure public safety. An examination of the record, however, does not reveal any question of fact regarding Transit's failure to follow prescribed procedures or protocols. Moreover, Plaintiffs' submission of an attorney-drafted CPLR 3101(d) disclosure stating that an expert transportation engineer would

testify concerning Transit's failure in its duty of care is not evidentiary proof in admissible form sufficient to defeat Transit's summary judgment motion (*Alvarez v Prospect Hosp*, 68 NY2d 320, 325 [1986]; *Bacani v Rosenberg*, 114 AD3d 454 [1st Dept 2014]).

Defendants have failed to present a *prima facie* entitlement to summary judgment as a matter of law based solely Defendant John Food's Director of Operations' testimony regarding employee training, food-handling and food-safety procedures. The fact that Plaintiff's co-worker ate the same meal as Plaintiff and both became sick several hours later, raises a question of fact for the jury whether the food served at Defendant's McDonald's was contaminated and the proximate cause of Plaintiff's accident and injury.

Accordingly, it is

ORDERED, that Defendant John C. Food Corp.'s motion for summary judgment is DENIED.

ORDERED, that Defendant Transit's motion for summary judgement is GRANTED.

Dated: September 27, 2018
New York, New York

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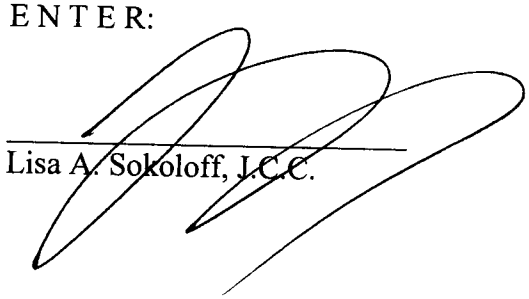

Lisa A. Sokoloff, J.C.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
APPLICATION:		GRANTED		DENIED	X	GRANTED IN PART	OTHER
		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE