Goodman-Meltser v Starbucks Corp.
2019 NY Slip Op 30336(U)
February 14, 2019
Supreme Court, New York County
Docket Number: 157421/2015
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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MELISSA GOODMAN-MELTSER and ARTHUR MELTSER,

Plaintiffs,

-against-

STARBUCKS CORPORATION, STARBUCKS COFFEE COMPANY, PREMIUM BRANDS HOLDING CORP., SK FOOD GROUP, GIORGIO FOOD INC., ABC CORPORATION (distributor whose name is unknown, XYZ CORPORATION (manufacturer whose name is unknown),

Defendants.

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DECISION AND ORDER
Index No.: 157421/2015
Motion Sequence 001

CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

In this product liability action, defendant SK Food Group ("SKF"), moves, pursuant to CPLR 3212, for summary judgment dismissing the Complaint as against it as well as all cross-claims against it by co-defendants. For the reasons set forth below, the Court denies SKF's motion in its entirety.

BACKGROUND FACTS

On or about September 18, 2014, Melissa Goodman-Meltser ("Plaintiff") allegedly injured herself when she bit into a foreign metal object in a Spinach Feta breakfast wrap she had purchased at a Starbucks store in Pleasantville, New York. Plaintiff broke her tooth when she bit down on the object, and since has suffered a variety of injuries and undergone extensive dental work (NYSCEF doc no. 1, ¶ 46). Plaintiff filed her complaint against Starbucks Corporation

("Starbucks"), as well as SKF and Giorgio Food Inc. ("Giorgio"), two food service companies that produce breakfast sandwiches for Starbucks (NYSCEF doc No. 24, ¶ 8). Plaintiff named both SKF and Giorgio as defendants in her complaint, which alleges negligence, strict product liability, and a breach of both the express and implied warranty of merchantability, as either company theoretically could have produced the wrap she eventually purchased. Products are delivered to Starbucks stores by a third-party distributor, so the food service companies have no knowledge or control over where their inventory eventually travels (NYSCEF doc No. 31 at 41). The store where Plaintiff purchased the wrap in question was serviced entirely by Bartlett Distribution Services, Inc. ("BDS"), a distribution company that would receive shipments from SKF and Giorgio (NYSCEF doc No. 24, ¶ 14).

On November 9, 2018, SKF filed a motion for summary judgment pursuant to CPLR 3212, arguing that documentary and testamentary evidence provided by BDS definitively establishes that SKF could not have produced the defective wrap (NYSCEF doc No. 24, ¶ 4). SKF therefore also argues that the cross-claims for indemnification against it by Starbucks should be dismissed (*id.*). Plaintiff and Starbucks have both filed oppositions to SKF's motion, contending that there are issues of fact regarding the possibility that SKF could have manufactured the wrap, as the documentary evidence does not conclusively establish where the wrap in question originated.

DISCUSSION

Summary judgment is granted when "the proponent makes '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,' and the opponent fails to rebut that showing" (*Brandy B.*

v Eden Cent. School Dist., 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the proponent has made a prima facie showing, the burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also, DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]). When the proponent fails to make a *prima facie* showing, the court must deny the motion, *"'regardless of the sufficiency of the opposing papers'"* (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez,* 68 NY2d at 324).

The function of a court in reviewing a motion for summary judgment "is issue finding, not issue determination, and if any genuine issue of material fact is found to exist, summary judgment must be denied" (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, [1st Dept 2012]). Where "credibility determinations are required, summary judgment must be denied" (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, [1st Dept 2012]). Thus, on a motion for summary judgment, the court is not to determine which party presents the more credible argument, but whether there exists a factual issue, or if arguably there is a genuine issue of fact (*DeSario v SL Green Management LLC*, 105 AD3d 421 [1st Dept 2013] (holding given the conflicting deposition testimony as to what was said and to whom, issues of credibility should be resolved at trial)).

Here, SKF argues that the documentary evidence definitively establishes that it could not have manufactured the wrap that caused Plaintiff's accident. It is uncontested among the parties that BDS was the sole distributor of the Starbucks store where Plaintiff purchased her sandwich. During discovery, BDS produced a record of deliveries it made to the store in 2014, as well as invoices from both Giorgio and SKF for sandwiches the food distributors sent to BDS that year. SKF contends that the delivery log establishes that the last delivery of the Spinach Feta wrap product to the store was on August 3, 2014. (NYSCEF doc No. 24, ¶ 14). As the store manager testified in a deposition that all unsold products were discarded after 14 days, a wrap delivered in August could not have been sold to Plaintiff on September 18 (NYSCEF doc No. 33 at 22). Additionally, a BDS representative provided an affidavit where he stated that he can "definitively state that BDS did not deliver Spinach Feta wraps manufactured by SK Food Group to the Store after August 2, 2014. I can further state that the Spinach Feta Wraps manufactured by SK Food Group which were delivered by BDS to the Store had a two day shelf life" (NYSCEF doc No. 36, ¶ 5). SKF argues that that this statement, combined with the delivery documentation and Starbucks' policy for disposing of inventory, establishes that there is no way it can be liable for Plaintiff's accident.

Upon review of the evidence presented, however, the Court is unconvinced that SKF has demonstrated there is no remote possibility it could have manufactured the wrap purchased by Plaintiff. The delivery log lists deliveries from BDS to the store on September 7 and 14, 2014, and as discussed, Starbucks kept products on sale for 14 days after receipt. SKF argues that the September deliveries were for a different product, because a different item number is listed next to the September deliveries on the log sheet. Specifically, the delivery log lists all deliveries

through August 3 as being for Item Number 9063, while later deliveries are listed for Item Number 8009 (NYSCEF doc No. 35 at 3). Although SKF does not make it clear in their papers, the inference it wishes the Court to draw seems to be that only deliveries labeled 9063 include the Spinach Feta wrap. While most of the invoices from SKF to BDS do list item number 9063 for the Spinach Feta wrap, the labeling is inconsistent. For example, a November 2014 invoice lists the wrap under 8009 (*id.* at 12). A review of the delivery log therefore does not definitively establish that the Spinach Feta wrap could not have been included in the September deliveries.

Regarding the sworn affidavit from BDS that SKF also relies on in its motion, the Court notes that an affidavit supporting a summary judgment motion must be made by a person "having knowledge of the facts" (*GTF Mktg. v Colonial Aluminum Sales,* 66 NY2d 965, 967 [1985]. If the affidavit is conclusory, or made "by an individual without personal knowledge of the facts," the proponent's high burden for establishing an entitlement to summary judgment is not satisfied. (*JMD Holding Corp. v Cong. Fin. Corp.*, 4 NY2d 373, 384-85 [2005]). In *JMD Holding Corp,* the Court declared that an affidavit by Plaintiff's president was conclusory as it was based on memoranda prepared by Plaintiff's counsel and lacked a factual basis (*id.)* Similarly, the Court finds that the affidavit provided by BDS is conclusory. No reasoning is stated for the conclusion that the wrap could not have been delivered after August 2. The representative who provided the affidavit also appeared for deposition where he was shown delivery documentation, and testified that he had "no idea" what changes in the Item Order number indicated, and that it "could be anything" (NYSCEF doc No. 32 at 36). Therefore, the reasoning for why the Item Number changes for the September deliveries is unclear at this juncture. The affidavit also states that the wraps produced by SKF had a two day shelf life,

which directly contradicts the store manager's testimony regarding the two week policy. The BDS representative also testified in his deposition that the frozen products had a six month shelf life once they were received by BDS (*id.* at 30-32), meaning BDS could have theoretically stored a wrap delivered in the spring and included it in a September delivery.

As there remains a question of fact regarding which company manufactured the wrap purchased by Plaintiff, the Court finds summary judgment premature at this stage in the proceedings. Accordingly, SKF's motion must be denied.

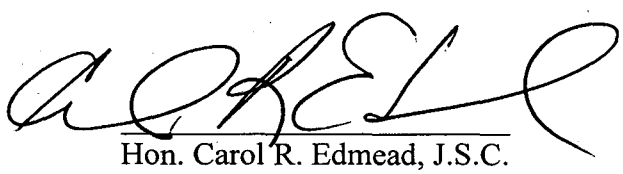
CONCLUSION

Based on the foregoing, it is hereby

ORDERED that Defendant SK Food Group's motion for summary judgment is denied in its entirety; and it is further

ORDERED that counsel for Plaintiff shall serve a copy of this decision, along with notice of entry, on all parties within 10 days of entry.

Dated: February 14, 2019



Hon. Carol R. Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.