

Jones v Sunac Food Corp.

2020 NY Slip Op 30483(U)

February 6, 2020

Supreme Court, Kings County

Docket Number: 523102/16

Judge: Edgar G. Walker

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 90 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 6th day of February, 2020.

PRESENT:

HON. EDGAR G. WALKER,
Justice.

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TANISHA JONES,
Plaintiff,

- against -

SUNAC FOOD CORP. AND SUNAC FOOD CORP.
d/b/a SUNAC NATURAL MARKET,

Defendants.

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SUNAC FOOD CORP. AND SUNAC FOOD CORP.
d/b/a SUNAC NATURAL MARKET,

Third-Party Plaintiffs,

- against -

JAMES C. CANNELL COFFEES, INC. d/b/a JIM'S
ORGANIC COFFEE AND METRO PAPER PLASTIC
SUPPLY,

Third-Party Defendants.

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The following e-filed papers read herein:

NYSCEF NO.

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	_____ 70-71 _____
Opposing Affidavits (Affirmations) _____	_____ 83 _____
Reply Affidavits (Affirmations) _____	_____ 87 _____

Upon the foregoing papers, defendants/third-party plaintiffs Sunac Food Corp. and Sunac Food Corp. d/b/a Sunac Natural Market (Sunac) move for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint as against them. Sunac also seeks dismissal of the complaint for spoliation of evidence.¹

Background and Procedural History

Plaintiff, Tanisha Jones (Jones), brings this action for personal injuries she allegedly sustained on June 3, 2014, when she was burned by hot tea served to her at the Sunac Natural Market, a grocery store located at 440 Union Avenue in Brooklyn.

During her deposition, Jones testified that on June 3, 2014, she finished her shift as a bartender at approximately 2:30 a.m. and left her job with a friend. Jones and her friend thereafter went to Sunac's store where she ordered a salad and a cup of tea at the front counter. She testified that an employee who was stocking shelves then went behind that front counter and poured water from a professional machine into a cup. The employee put a sleeve and lid on the cup and placed the tea in front of her. Jones testified that when she observed the employee walk to the cash register, which was at a different counter, she picked up the tea to follow him. At that point, she noticed the tea was extremely hot. Notably, Jones testified that the cup felt hotter than other times she had bought tea. Jones claimed she rested the cup on her left palm because the bottom rim had more material to shield her from the

¹Although Sunac did not request dismissal of the complaint for spoliation of evidence in their notice of motion, they clearly request such relief in their supporting affirmation and memorandum of law.

heat, and moved her right hand from the sleeve to the top of the cup. She testified that the lid was firmly secured on the cup, and recalled commenting to her friend that the tea was hotter than normal as they walked back to her friend's car. After Jones sat down in the passenger seat of her friend's vehicle, she released her right hand from the lid and attempted to grab/hold of the cup at which point the cup lost its structure. Jones testified that the cup "got soft and it squeezed the rim, the rim went to an oval shape, and the top popped off" (Jones tr at 70, lines 9-11). As a result, the hot water poured onto her left leg, left thigh and abdomen causing Jones to scream and get out of the vehicle. Jones further testified that she dropped the cup and does not know where it ended up. Thereafter, Jones' friend drove her to the hospital.

Sung Kim (Kim), the general manager of the Sunac store, appeared for a deposition on behalf of Sunac. Kim testified that Sunac leased their coffee machine from Jim's Organic Coffee Company (JOC), and also ordered the cups Sunac used for hot beverages from the same company. He further testified that Sunac bought the cup lids and sleeves from Metro Paper, a wholesaler. Kim testified that the store was inspected each year by a state regulatory agency, but the agency did not inspect the type of cups they used for dispensing hot beverages. He also stated that the cashiers were instructed to use the hot water from the coffee machine when they were preparing tea for customers. He testified that the cashiers were also responsible for placing a lid and sleeve on the cups. Kim did not know the temperature of the hot water dispensed from the coffee maker nor did he do any testing to determine the temperature.

In her complaint, dated December 27, 2016, Jones alleges three causes of action: 1) breach of express and implied warranty of merchantability and fitness, 2) strict liability in tort and/or strict products liability, and 3) negligence for failing to properly prepare and serve the beverage, failing to properly secure the beverage container and provide an adequate sleeve, serving the beverage at an unsafe temperature without adequate protection, and failing to warn plaintiff. Sunac answered the complaint on or about February 13, 2017, denied the material allegations therein and asserted 10 affirmative defenses. Sunac subsequently brought a third-party action against third-party defendants James C. Cannell Coffees, Inc. d/b/a Jim's Organic Coffee and Metro Paper Plastic Supply (Metro Paper).

Parties' Contentions

Sunac argues that they are entitled to summary judgment dismissing the complaint because plaintiff has not shown, and cannot establish, that the cup, lid, and sleeve were defective. Sunac contends they had no duty to warn plaintiff of the danger of hot tea as such danger was reasonably contemplated by plaintiff. Sunac further contends that the hot tea was not unreasonably dangerous for its intended use. Additionally, Sunac maintains that they did not participate in the design or manufacture of the subject cup, lid and sleeve, nor do they have privity with the manufacturer, therefore, they were not negligent in the preparation or service of the tea to plaintiff. Sunac further maintains that they did not have actual or constructive notice of any problem with their cups or the water. Sunac also requests dismissal of the complaint for spoliation of the cup, lid and sleeve, arguing that the absence

of such evidence makes their inspection of the alleged defective products and defense of the instant action impossible.

In opposition, plaintiff asserts that Sunac failed to provide sufficient evidence to entitle them to summary judgment or, in the alternative, that there are multiple issues of fact barring judgment in Sunac's favor as a matter of law. Plaintiff questions the precedent relied upon by Sunac, and notes that she is not required to preview how she intends to prove her claims at trial in order to oppose this motion. Instead, plaintiff asserts that Sunac bears the initial burden of establishing their prima facie entitlement to summary judgment.

Plaintiff argues that Sunac has failed to make such a prima facie showing in that they failed to produce evidence that the water served to plaintiff was within the range that would normally be expected by a typical customer who orders tea, or that the machine that dispensed the hot water was in good working condition. Plaintiff argues that Kim's testimony demonstrates that Sunac did not know, nor ever test, the temperature of their hot water.

In relation to the specific allegations of the complaint, plaintiff argues that she has sufficiently identified the defect as a super-heated liquid dispensed from an uninspected beverage machine into a defective cup, which lost its shape and melted. She further argues that the cup given to her did not display any warnings of said defects. Plaintiff also posits that Sunac's assertion that she was aware that the unreasonably hot water would cause the cup to lose its shape and result in her suffering second-degree burns is untenable. Nonetheless, plaintiff argues that the extent of her knowledge of the hazard should, at the

very least, be a question of fact for the jury. Plaintiff further points out that there is no evidence that she made any modifications or alterations to the tea served to her. Plaintiff argues that, although Sunac asserts they did not manufacture, produce or distribute the subject cup, sleeve or lid, the defendants admitted that they failed to inspect their coffee machine or monitor the temperature of the water dispensed. Plaintiff further argues that her own admission that the lid was secured when she took the tea from the counter does not negate Sunac's negligence in serving super-heated water. Plaintiff also opposes Sunac's argument that they did not have actual or constructive notice of the defective condition. In this regard, plaintiff argues that Sunac's lack of notice is attributed to their negligence in failing to inspect the machine. Plaintiff also argues it is not relevant that there is no evidence of prior complaints or similar accidents.

With regards to the Sunac's accusations of spoliation, Jones argues that dismissal of her complaint would be wholly unwarranted given the exigent circumstances surrounding her accident, her immediate treatment after the spill, and the absence of any evidence she retained the cup after she was burned. Further, plaintiff argues that dismissal is too drastic a remedy especially since she has offered an example of the subject cup for Sunac's inspection. In reply, Sunac argues that they have met their burden for dismissal of the causes of action for strict liability and breach of warranty because they were not involved in the chain of manufacturing. Sunac further argues that they cannot be held negligent because they did not have notice that their cup was defective or the water was excessively hot, and plaintiff fails to provide a triable issue of fact on these issues. In addition, Sunac reasserts

their request for dismissal of the complaint due to spoliation based on plaintiff's failure to preserve the cup, lid and sleeve. Sunac maintains that they are unfairly prejudiced by the inability to inspect the product that allegedly caused the accident. In this regard, Sunac argues that Jones was the only one in the position to preserve the product, and notes that the exemplar offered years after the incident was not authenticated. Thus, they are unable to discern whether the exemplar is similar to the one that caused the plaintiff's injuries, thereby hampering their ability to defend the instant action.

Sunac's Motion for Summary Judgment

A party seeking summary judgment has the burden of establishing his or her defense "sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks and citation omitted]; see CPLR 3212[b]). The moving party bears the burden of prima facie showing its entitlement to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material issue of fact (see CPLR 3212 [b]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). Conflicting inferences and issues of credibility will preclude summary judgment to a party and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (see *Open Door Foods, LLC v Pasta Machs., Inc.*, 136 AD3d 1002, 1004-1005 [2d Dept 2016]; see also *Benetatos v Comerford*, 78 AD3d 750, 751 [2d Dept 2010]). However, conclusory allegations unsupported by competent evidence are insufficient to defeat a summary judgment motion

(see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]). Failing to make that showing requires denying the motion, regardless of the adequacy of the opposing papers (see *Vega v Restani Constr. Corp.*, 18 NY3d 499, 502 [2012]). Once movant has made its prima facie showing, the burden shifts to the non-moving party to show “facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]).

“[A] defendant may properly be held liable for personal injuries caused by service of a beverage that, because of its excessive temperature, was unreasonably dangerous for its intended use, and the drinking or other use of which presented a danger that was not reasonably contemplated by the consumer” (*Khanimov v McDonald’s Corp.*, 121 AD3d 1052, 1053-1054 [2d Dept 2014]; see also *McClellan v National Ctr. For Disability Servs.*, 30 AD3d 383, 384 [2d Dept 2006]). Where such claims are alleged, “a prima facie showing of entitlement to summary judgment would necessarily have to entail proof that the [beverage] served to the plaintiff had not been ‘heated beyond reasonably expected limits’” (*McClellan, supra* at 384, quoting *Fung-Yee Ng v Barnes & Noble*, 308 AD2d 340, 340-341 [1st Dept 2003]).

Sunac failed to produce competent evidence to establish that the tea served to Jones on June 3, 2014 was within the range that would normally be expected by a typical consumer of tea. Defendants also failed to present proof that the machine dispensing hot water for the tea was in good working order, or that it was operating within required temperature parameters. Sunac instead relies on plaintiff’s deposition testimony which actually supports the opposite inference; that the water dispensed to her that day was heated beyond reasonably

expected limits (*see Khanimov*, 121AD3d at 1054). In fact, the plaintiff specifically testified that she had to position her hands on the cup in a certain way because it seemed hotter than she was used to (*see Jones tr* at 58, lines 16-25; at 59, lines 16-24). Therefore, Sunac has failed to meet their prima facie burden to excuse them from liability under the theory they negligently breached the duty of reasonable care to their customer. As such, the burden does not shift to plaintiff to produce evidence sufficient to establish the existence of a material issue of fact (*see CPLR 3212[b]*).

Turning to the strict products liability and breach of warranty causes of action, it is well settled that “[l]iability may not be imposed . . . upon a party that is outside the manufacturing, selling and distribution chain” (*see Quinones v Federated Dept. Stores, Inc.*, 92 AD3d 931, 931 [2d Dept 2012][internal quotations omitted]; *see also Joseph v Yenkin Majestic Paint Corp.*, 261 AD2d 512, 512 [2d Dept 1999]). Here, Sunac established their prima facie entitlement as a matter of law to dismiss the causes of action alleging breach of warranty and strict liability by demonstrating that they are outside the manufacturing, selling and distribution chain. Sunac purchased the subject lid and sleeve from Metro Paper, and the cups used to serve tea from JOC. In opposition to their prima facie showing, plaintiff failed to raise a triable issue of fact.

Sunac’s Request to Strike the Amended Complaint

“[W]hen a party negligently loses or intentionally destroys key evidence, the responsible party may be sanctioned under CPLR 3126” (*Franco Belli Plumbing & Heating*

& Sons, Inc. v Dimino, 164 AD3d 1309, 1313 [2d Dept 2018] [internal quotations omitted]; see also *Ortega v City of New York*, 9 NY3d 69, 76 [2007]). In *Pegasus Aviation I, Inc. v Varig Logistica S.A.* (26 NY3d 543, 547 [2015]), the Court of Appeals stated:

“A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to the party’s claim or defense such that the trier of fact could find that the evidence would support that claim or defense” (internal quotation marks omitted).

Spoliation sanctions under CPLR 3126 are only available against a party to the litigation for acts of that party or those under that party’s control (see *Mia Acupuncture, P.C. v Mercury Ins. Co.*, 26 Misc 3d 39, 40 [2d Dept 2009] [“By its terms, the CPLR 3126 (3) dismissal sanction is applicable only to the disclosure violations of parties, not nonparties”]). When the spoliator is not a party to the litigation, sanctions are not available unless the movant demonstrates that the nonparty was under a party’s control at the time disclosure is sought (see *Pegasus*, 26 NY3d at 553-554; *Ortega*, 9 NY3d at 80).

Here, plaintiff went directly to the hospital following the incident and there is no evidence that either she or anyone under her control destroyed or otherwise disposed of the cup, sleeve or lid. Furthermore, Sunac knows full well what they gave plaintiff. They know full well whether the exemplar supplied by the plaintiff is what they gave her and do not need her to authenticate it. As they have not alleged that they were no longer using the cups in

January, 2017 when this action was commenced, they could have taken as many exemplars as they liked from their own storeroom.

Accordingly, it is hereby

ORDERED that Sunac's motion for an order pursuant to CPLR 3212 seeking summary judgment dismissing the complaint and any cross-claims as against them is granted to the extent that the first cause of action for breach of express and implied warranty of merchantability and fitness, and the second cause of action for strict liability in tort and/or strict products liability are dismissed, and it is further

ORDERED that the branch of Sunac's motion seeking to dismiss plaintiff's third cause of action for negligence is denied, and it is further

ORDERED that the branch of Sunac's motion for an order pursuant to CPLR 3122 striking plaintiff's complaint for spoliation of evidence is denied.

The foregoing constitutes the decision and order of this Court.

ENTER,



J. S. C.

HON. EDGAR G. WALKER

KINGS COUNTY CLERK
FILED
2020 FEB 13 AM 8:05

