

Kazemi v Boqueria Soho, LLC
2020 NY Slip Op 33888(U)
November 24, 2020
Supreme Court, New York County
Docket Number: 155646/2018
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14

Justice

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YASSAMAN KAZEMI

Plaintiff,

- v -

BOQUERIA SOHO, LLC,

Defendant.

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INDEX NO. 155646/2018
MOTION DATE 11/23/2020
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 39, 40, 41, 42

were read on this motion to/for JUDGMENT - SUMMARY.

The motion by plaintiff for summary judgment is denied.

Background

On September 23, 2016, plaintiff was dining at defendant's restaurant. She ordered a tapas dish with sirloin steak and piquillo pepper confit. Plaintiff claims that when she bit into the piquillo pepper, she bit into a concealed piece of a sharp bone which caused severe injuries. She claims that she is entitled to summary judgment under the doctrine of res ipsa loquitur and implied warranty. Plaintiff maintains that defendant's failure to remove the sharp bone from the pepper constitutes negligence as a matter of law.

In opposition, defendant argues that there are numerous issues of fact that preclude summary judgment. It claims that plaintiff cannot show whether the bone came from the steak and whether she bit into it while eating the steak, whether her companion cut the bone out of the steak and left it in a small plate of tapas before biting into the bone, whether plaintiff ordered a boneless steak entrée, and whether plaintiff should have reasonably anticipated finding a small

bone shard in her steak. Defendant insists that under the reasonable expectation test applied by courts in this state, the Court cannot grant plaintiff's motion. It concludes that plaintiff should have reasonably anticipated bones in her steak.

Plaintiff maintains in reply that this incident is not one that would ordinarily occur in the absence of defendant's negligence. She emphasizes that under the reasonable expectation test, she should be able to recover.

Discussion

To be entitled to the remedy of summary judgment, the moving party "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 from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec*,

Ltee, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

“In order to submit a case to a trier of fact based on [res ipsa], a plaintiff must establish that the event (1) was of a kind that ordinarily does not occur in the absence of someone’s negligence; (2) was caused by an agency or instrumentality within the exclusive control of the defendant and (3) was not due to any voluntary action or contribution on the part of the plaintiff” (*Singh v United Cerebral Palsy of New York City, Inc.*, 72 AD3d 272, 276-77, 896 NYS2d 22 [1st Dept 2010] [internal quotations and citation omitted]).

“The ‘reasonable expectation’ doctrine, as applied to an action to recover damages for common-law negligence, requires a restaurant owner to use ordinary care to remove from the food as served, such harmful substances as the consumer would not ordinarily anticipate” (*Schmidt v Fourth Wall Restaurants, LLC*, 155 AD3d 986, 987, 63 NYS3d 893 (Mem) [2d Dept 2017] [internal quotations and citation omitted]). Finding a bone in a dish does not necessarily support a claim under this doctrine (*Amiano v Greenwich Vil. Fish Co., Inc.*, 151 AD3d 484, 53 NYS3d 531 (Mem) [1st Dept 2017] [granting summary judgment and dismissing a case where plaintiff sought damages after biting into a bone while eating a fillet of flounder and observing that the bone was not a harmful substance that plaintiff could not have anticipated]).

As an initial matter, the Court must decide whether plaintiff could have reasonably anticipated that there would be a bone in the dish. Plaintiff testified that she and her companion (Mr. Mount) ordered a bunch of small plates for them to share (NYSCEF Doc. No. 31 at 14). One of those was a steak dish (*id.* at 15). She did not remember whether she or Mr. Mount cut into the steak first (*id.* at 16).

Plaintiff testified that when she was eating the vegetables that came with the steak dish, “I took a bite; I felt something hard. I had a pain, and I knew I bit into something that wasn’t a vegetable. I wasn’t sure what it was” (*id.* at 20). Plaintiff contends that she spit it out and thought she saw what looked like a bone (*id.*).

Based on this testimony, the Court denies the motion. The fact is that plaintiff ordered a steak dish with vegetables and bit into a bone while chewing on a vegetable.¹ There is clearly an issue of fact with respect to whether a she should have reasonably anticipated that a bone might be found in a steak dish. That the bone was found in the vegetables does not compel the Court to reach a different outcome. A bone could easily have been dislodged while cutting the steak and found its way into a forkful of vegetables.

This is not a case where plaintiff claims she found a bone in a purely vegetarian dish or even that the steak dish was boneless. Under the reasonable expectation doctrine, there is an issue of fact regarding whether a patron at a restaurant might reasonably expect to find a bone in a steak dish regardless of the fact that the bone was found while eating the vegetables. For the same reasons described above, plaintiff is not entitled to summary judgment on her implied warranty claim (*see Rudloff v Wendy's Rest. of Rochester, Inc.*, 12 Misc 3d 1081, 1094 [Buffalo City Ct 2006] [finding an issue of fact on an implied warranty claim where plaintiff broke a tooth while biting into a double cheeseburger at a Wendy’s restaurant]).

With respect to the *res ipsa loquitur* claim, the Court denies that branch of the motion. Defendant did not have exclusive control over the dish—someone (either plaintiff or Mr. Mount) had to cut into the steak and it is possible that the bone escaped from the steak and into the

¹ Plaintiff did not recognize the menu produced at her deposition, although the menu appeared to have only one steak dish. But this is immaterial because plaintiff recalled ordering a dish of steak with vegetables.

vegetables during this process. Simply put, the fact that the dish was placed under the control of the patrons makes the *res ipsa loquitur* doctrine inapplicable.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment is denied.

11/24/2020

DATE



ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE