

Koutsopoulos v Kefi, LLC

2021 NY Slip Op 31347(U)

April 22, 2021

Supreme Court, New York County

Docket Number: 158319/2017

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

**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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INDEX NO. 158319/2017

CONCETTA KOUTSOPOULOS, HARALAMBOS
KOUTSOPOULOS,

MOTION DATE 04/21/2021

Plaintiff,

MOTION SEQ. NO. 002

- v -

KEFI, LLC D/B/A KEFI, MICHAEL PSILAKIS, LLC D/B/A
PSILAKIS GROUP, 505 COLUMBUS, LLC

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99

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

The motion by defendants for summary judgment is granted.

Background

Plaintiff (Concetta Koutsopoulos, "plaintiff") contends that she slipped and fell inside defendants' restaurant on April 10, 2016. She claims that she slipped on liquid on the basement level as she was headed toward the restrooms. Plaintiff admits that she did not see the liquid before she fell. Defendants claim that plaintiff is misrepresenting the cause of her fall. They claim that video surveillance shows that plaintiff staged an accident. Defendants concluded that the video clearly shows that plaintiff simply did not lift her foot high enough to clear a normal step and then fell.

In opposition, plaintiff demands that the Court disregard the video. She claims that the video was produced after all depositions had been completed and she insists that the video was doctored. Plaintiff argues that the video only shows one minute and fourteen seconds and does not show the aftermath.

In reply, defendants point out that the video surveillance exhibit was recorded by the manager on her cellphone. This witness, Jessica Pinillo, observed that the video footage on the surveillance system gets recorded over so she made a recording with her cell phone. Nearly four years after the incident (in March 2020), the general manager of the restaurant told her someone might be contacting her about the incident. Counsel for defendants claims that when he reached out to Ms. Pinillo (after the general manager's deposition) she located the old phone and found the video. This witness was later deposed.

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]).

The central question on this motion is the admissibility of the video (exh L). In the Court's view, this video clearly shows that plaintiff did not slip and fall. Instead, she appears to trip after failing to raise her left leg high enough to reach the first step of the staircase. The video clearly conflicts with plaintiff's account of the accident, where she testified that "I was taking that first step to go up and I slipped" (NYSCEF Doc. No. 71 at 64).

The series of events that lead to the discovery of the video does not compel the Court to disregard it. From the record before this Court, it appears that the general manager mentioned Ms. Pinillo as a potentially relevant witness during his deposition and then counsel for defendants reached out to her. That is how discovery is supposed to unfold; defendants are not barred from relying upon this witness or the video she took because defendants were not instantly aware of every available witness when the case began. This is not a case where a video appears on the eve trial. In fact, plaintiff had the chance to depose this witness about the video.

To the extent that plaintiff asks the Court to preclude the video, that request is denied as no cross-motion was made for this relief. For some reason, plaintiff waited until filing its opposition to the instant motion by defendants to seek exclusion of the video.

The manager that day, Ms. Pinillo, claimed that she recorded the video on the day of the incident and testified that the general manager of the restaurant contacted her about this incident in March 2020 (NYSCEF Doc. No. 77 at 49-50). She explained that “the screens are cracked” on the phone and that she got a new phone but “kept the phone in a box in my mom’s basement” (*id.* at 54). Ms. Pinillo noted that she plugged in the phone after counsel for defendants reached out to her and saw the video (*id.* at 54-55). This testimony further supports its admissibility in this case.

The Court also rejects plaintiff’s claim that the video was doctored or represents an incomplete version of the incident. That assertion is mere speculation. Moreover, the Court is unaware what a longer version of the surveillance video would show. The exhibit attached to this motion depicts plaintiff walking toward the bottom of a staircase and the falling when she failed to raise her left foot to the first step. There is no indication of slip and fall whatsoever.

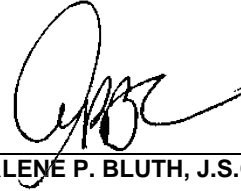
With the consideration of the video, the Court has no choice but to grant the instant motion. Although this Court does not conclude (as defendants argue) that this was a staged accident (it could be that plaintiff was simply not paying attention), the fact is that plaintiff’s account of the accident did not happen as she said it did. And the video established defendants’ prima facie burden to show that plaintiff did not slip and fall (*see James v Kensington Assoc., LLC*, 192 AD3d 587, 2021 NY Slip Op 01847 [1st Dept 2021]). Plaintiff did not raise an issue of fact in opposition—her position remains that she slipped and fell. Simply put, the defect plaintiff complains about, even if it existed, did not cause her to fall. Defendants cannot be held liable under these circumstances.

Accordingly, it is hereby

ORDERED that the motion by defendants for summary judgment dismissing this case is granted and the Clerk shall enter judgment accordingly, along with costs and disbursements, upon presentation of proper papers therefor.

4/22/2021

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