

Cridland v Bunna, LLC

2021 NY Slip Op 34020(U)

September 29, 2021

Supreme Court, Bronx County

Docket Number: Index No. 25170/2019E

Judge: Rubén Franco

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - IAS PART 26

ANSEL L. CRIDLAND,

Plaintiff,

-against-

BUNNA, LLC d/b/a BUNNA CAFÉ,

Defendants.

Index No. 25170/2019E

**MEMORANDUM
DECISION/ORDER**

Rubén Franco, J.

In this negligence action, defendant moves to dismiss the second and third causes of action for nuisance and strict liability (CPLR 3211 [a] [7]), and for summary judgment (CPLR 3212) dismissing the Complaint.

On February 24, 2018, plaintiff was dining at the Bunna Café, a restaurant owned and operated by defendant Bunna LLC, when a wine glass broke in his hands, causing injuries to his hands. Plaintiff alleges that defendant negligently provided him with a defective wine glass. Defendant argues that plaintiff neither identifies any defect in the glass, nor shows that defendant’s maintenance procedures for the glass caused or contributed to this incident.

Defendant submits a statement of material facts in compliance with 22 NYCRR § 202.8-g, and plaintiff fails to provide a “statement of the material facts as to which it is contended that there exists a genuine issue to be tried.” Thus, the facts as stated by defendant are deemed admitted.

On a motion pursuant to CPLR 3211 (a) (7), a Complaint must be liberally construed, the factual allegations set forth must be accepted as true, the plaintiff must be given the benefit of all favorable inferences therefrom, and the court must decide only whether the facts alleged fall under any recognized legal theory (*see Maddicks v Big City Props., LLC*, 34 NY3d 116, 123 [2019]; *Lee v Dow Jones & Co., Inc.*, 121 AD3d 548 [1st Dept 2014]). Affidavits may be considered freely “to preserve inartfully pleaded, but potentially meritorious, claims” in a Complaint (*Rovello v Orofino*

Realty Co., 40 NY2d 633, 635 [1976]; *Finkelstein Newman Ferrara LLP v Manning*, 67 AD3d 538, 540 [1st Dept 2009]). Vague and conclusory allegations are insufficient to maintain a cause of action (see *Fowler v American Lawyer Media*, 306 AD2d 113 [1st Dept 2003]).

Nuisance

The elements of this claim include a substantial interference with a plaintiff's use and enjoyment of land caused by conduct intentional in origin and unreasonable in character (see *Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 568 [1977]). The Complaint alleges that defective glassware in a restaurant constitutes a nuisance to patrons. Notwithstanding that plaintiff does not assert facts related to the elements of a nuisance claim, plaintiff also does not argue against that branch of defendant's motion seeking its dismissal, rendering the claim abandoned (see *Elam v Ryder Sys., Inc.*, 176 AD3d 675, 676 [2nd Dept 2019]; *Moonstone Judge, LLC v Shainwald*, 38 AD3d 215, 216 [1st Dept 2007]; *Genovese v Gambino*, 309 AD2d 832, 833 [2nd Dept 2003]). Thus, this cause of action is dismissed.

Strict Liability

In *Hoover v New Holland N. Am., Inc.* (23 NY3d 41, 53 [2014]), the Court stated that where “a plaintiff is injured as a result of a defectively designed product, the product manufacturer or others in the chain of distribution may be held strictly liable for those injuries.” The Court further stated: “To establish a prima facie case for design defect, the plaintiff must show that the defendant ‘breached its duty to market safe products when it marketed a product designed so that it was not reasonably safe and that the defective design was a substantial factor in causing plaintiff's injury’ (*Voss [v Black & Decker Mfg. Co.]*, 59 NY2d [102] at 106-107 [1983]; see *Adams v Genie Indus., Inc.*, 14 NY3d 535, 542 [2010]).” (*id.* at 54; see also *Fasolas v Bobcat of N.Y., Inc.*, 33 NY3d 421, 429 [2019]; *Rabon-Willimack v Robert Mondavi Corp.*, 73 AD3d 1007, 1008 [2nd Dept 2010].) To establish

liability on a strict products liability claim, a plaintiff would need to allege facts (1) that the product in question was not fit to be used as intended, (2) that the defect existed as of the time that it left the defendant's hands, (3) that the plaintiff used the product as it was intended to be used, (4) that the plaintiff would not have been able to discover any defect in the product through the exercise of ordinary care, and (5) that the defect was a substantial factor in causing the accident (*see Winckel v Atlantic Rentals & Sales*, 159 AD2d 124, 126 [2nd Dept 1990]).

A party outside the chain of manufacturing, selling or distribution cannot be held strictly liable for a defective product (*see Laurin Mar. AB v Imperial Chem. Indus.*, 301 AD2d 367-368 [1st Dept 2003]). Defendant here was an end purchaser of the wine glass, not a seller, hence, it was not part of the distribution chain of manufacturers, sellers, or distributors, and thus is not subject to strict liability. Although the Third Cause of Action of the Complaint denominates this claim as one for "strict liability," plaintiff's attorney states (affirm. in opp. ¶ 33) that it is a *res ipsa loquitor* theory "alleged as strict liability..." The allegation is that defendant was in possession and control of the glassware, which was negligently released and disseminated to patrons resulting in injury. There is no allegation of a manufacturing or design defect, or failure to warn attributable to defendant. Defendant submits the affidavit of Lance Wilson, Ph.D., a Materials Scientist with a forensic engineering firm, who examined an exemplar of the wine glass, as well as defendant's procedures and products used to clean the wine glasses and determined that the glass had no defects that would cause it to spontaneously shatter, and that defendant's maintenance procedures were proper for the care of the glass. In opposition, plaintiff does not submit direct evidence that a defect existed. Thus, the court finds that the Complaint does not assert a claim for strict liability, nor does plaintiff raise an issue of fact as to strict liability.

To the extent that plaintiff's intent was to rely on the doctrine of *res ipsa loquitur*, this is a theory of negligence, not strict liability. In any event, *res ipsa loquitur* is not a separate theory of liability, therefore, since plaintiff pleads a cause of action for negligence, there is no need to plead a separate *res ipsa loquitur* claim which, under the proper circumstances, would be available for a jury to consider under the negligence cause of action (*see Smith v Consolidated Edison Co. of N.Y., Inc.*, 104 AD3d 428, 429 1st Dept 2013]).

Summary Judgment -- Negligence

A party moving for summary judgment must show *prima facie* an entitlement to judgment as a matter of law by tendering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*Stonehill Capital Mgt. LLC v Bank of the W.*, 28 NY3d 439, 448 [2016]; *Friends of Thayer Lake LLC v Brown.*, 27 NY3d 1039, 1043 [2016]; *Pokoik v Pokoik*, 115 AD3d 428 [1st Dept 2014]; CPLR 3212 [b]). The inability to make such a demonstration must lead to denial of the motion, no matter how inadequate the opposition papers may be (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Santiago v Filstein*, 35 AD3d 184, 186 [1st Dept 2006]). To defeat summary judgment, the party opposing the motion must show, also by producing evidentiary proof in admissible form, that there is a material question of fact that requires a trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]; *see Hoover v New Holland N. Am., Inc.*, 23 NY3d 41, 56 [2014])). Admissible evidence includes affidavits by persons having knowledge of the facts (*see Viviane Etienne Med. Care, P.C. v Country-Wide Ins. Co.*, 25 NY3d 498, 508 [2015]). The movant has the initial burden on the motion (*see Gammons v City of New York*, 24 NY3d 562, 569 [2014]; *Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 137-138 [1st Dept 2012]; *Jaroslavicz v Prestige Caterers*, 292 AD2d 232, 233 [1st Dept 2002]). Summary judgment should be granted where it clearly appears that the issues are not genuine

but feigned (*see Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Garcia-Martinez v City of New York*, 68 AD3d 428, 429 [1st Dept 2009]). Asserting mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*see Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992]; *Bonghi v Firstcent Shopping Ctr.*, 116 AD2d 502, 504 [1st Dept 1986]).

In *Pintor v 122 Water Realty, LLC*, 90 AD3d 449, 451 [1st Dept 2011]), the court stated that the “owner of a premises may be held liable for an accident caused by a dangerous condition on the property if the plaintiff can demonstrate that the owner created the condition or had actual or constructive notice of it (*see Hauptner v Laurel Dev., LLC*, 65 AD3d 900, 902 [(1st Dept) 2009]). An owner can be deemed to have constructive notice of a dangerous condition if it is visible and apparent, and if the condition existed for enough time before the accident to permit the owner's employees to discover and remedy the problem (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).” Further, “a defendant is entitled to summary judgment as a matter of law when a plaintiff provides testimony that he or she is unable to identify the defect that caused his or her injury (*see Rudner v New York Presbyt. Hosp.*, 42 AD3d 357 [(1st Dept) 2007]; *Reed v Piran Realty Corp.*, 30 AD3d 319 [(1st Dept) 2006], *lv denied* 8 NY3d 801 [2007]; *Fishman v Westminster House Owners, Inc.*, 24 AD3d 394 [(1st Dept) 2005]).” (*Siegel v City of New York*, 86 AD3d 452, 454 [1st Dept 2011].)

In support of its motion, defendant relies on, among other things, the deposition of its principal, Liyuwork Ayalew, who also provides an affidavit; the deposition of plaintiff; its statement of material facts; and the affidavit of its expert Lance Wilson, Ph.D.

In opposition, plaintiff submits the affidavits of two persons who were sitting at the same table as plaintiff who, like plaintiff, could not identify any defect in the wine glass. These individuals provided contradictory statements regarding where the waiter brought the subject glass from: one

stated that it was from the kitchen and the other said it was from the bar. Liyuwork Ayalew, defendant's principal, stated in his affidavit that wine glasses are washed and dried in the kitchen. Evidence which tends to show that defendant's procedure may have been altered regarding the cleaning and drying of the subject wine is insufficient to raise a question of fact regarding whether defendant was negligent (*see Pomahac v TrizecHahn 1065 Ave. of Ams., LLC*, 65 AD3d 462, 465 [1st Dept 2009]).

The court declines to consider plaintiff's thermal glass theory as the cause of the wine glass breakage for several reasons: First, it was raised for the first time by plaintiff's counsel in his affirmation in opposition to the instant motion. It was not alleged in the Complaint, nor was it raised in the Bill of Particulars or in the deposition testimony, thus, defendant was not placed on notice that plaintiff would rely on this theory (*see Mitchell v 423 W. 55th St.*, 187 AD3d 661, 662 [1st Dept 2020]). Second, thermal shock is not a matter commonly known to lay persons and requires the presentation of expert proof, which plaintiff failed to provide (*see James v Wormuth*, 21 NY3d 540 [2013]; *see also Sean R. v BMW of N. Am., LLC*, 26 NY3d 801, 809 [2016]). Additionally, the burden that a party must bear in opposing a summary judgment motion is not met by the unsubstantiated assertions or speculations of its attorney (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 327 [1986]).

Plaintiff fails to provide any evidence tending to establish that there was a defect in the wine glass. There are no allegations that defendant created the defect or had actual or constructive notice of a dangerous condition. Plaintiff testified at his deposition that he did not observe any defects in the glass, such as cracks or chips, and he was not aware of any complaints made by anyone to defendant regarding the condition of glassware, nor could he recall whether the glass was warm or cold, or how much pressure he applied to the glass when he picked it up with both hands.


Plaintiff invokes the doctrine of *res ipsa loquitur*, which is established by showing that the incident is one which ordinarily does not occur in the absence of negligence; was caused by an agency or instrumentality within the exclusive control of the defendant; and was not due to any voluntary action or contribution on the part of the plaintiff (*see Morejon v Rais Constr. Co.*, 7 NY3d 203, 209 [2006]; *Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226-227 [1986]; *Uddin v City of New York*, 88 AD3d 489, 490 [1st Dept 2011]).

At the time the incident occurred here, the wine glass was under the control of plaintiff, not defendant. The glass, which had not been in use for more than three months before the incident, was filled with wine by one of plaintiff's companions, and did not break until after plaintiff grasped it with both hands. The court finds that since the glass was not in defendant's exclusive control at the time of the incident, the doctrine of *res ipsa loquitur* does not apply.

Accordingly, defendant's motion to dismiss the second and third causes of action for nuisance and strict liability and for summary judgment, is granted.

This constitutes the Decision and Order of the court.

Dated: September 29, 2021



Rubén Franco, J.S.C.

HON. RUBÉN FRANCO