# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** HON. DAVID B. COHEN **PART** 58

*Justice*

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**INDEX NO.** 153204/2020

LAUREN De NIRO PIPHER,

Plaintiff,

**MOTION SEQ. NO.** 001

- v -

JEAN-GEORGES OF POUND RIDGE, LLC D/B/A THE INN AT POUND RIDGE BY JEAN-GEORGES,

**DECISION + ORDER ON MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34

were read on this motion to/for SUMMARY JUDGMENT.

In this negligence action commenced by plaintiff Lauren De Niro Pipher, defendant Jean-Georges of Pound Ridge, LLC d/b/a The Inn at Pound Ridge by Jean-Georges ("defendant" or "the restaurant") moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff opposes the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

## FACTUAL AND PROCEDURAL BACKGROUND

This case arises from an incident on December 1, 2018 in which plaintiff was allegedly injured when she swallowed a piece of metal in her food while dining at the restaurant, which was owned and/or operated by defendant. Docs. 1, 21. In her complaint, plaintiff alleged that she was injured due to the defendant's negligence. Doc. 1. In her bill of particulars, she again alleged that defendant was negligent and also claimed that it had actual and/or constructive notice of the presence of the piece of metal in plaintiff's meal. Doc. 21.

At her deposition, plaintiff testified that she ordered a salad and bass for dinner. Doc. 23 at 24. She described the bass as being "split in the middle" and consisting of two pieces of filet with the skin on. Id. at 25-26. When she began eating the fish, she swallowed a piece of it without chewing, felt like she had swallowed a large fish bone, and grasped at her throat. Id. at 28-30. She coughed and then took a big sip of water or wine to help her swallow the piece of fish. Id. at 28. She inspected the fish on her plate to see if there were any other bones and, when she did not see any, she continued eating her meal. Id. at 29-30. She did not report the incident to anyone at the time it occurred. Id. at 30.

At approximately 4:00 a.m. the morning after she ate at the restaurant, plaintiff woke up with "very, very sharp deep pain in what [she] believed to be [her] stomach." Id. at 37. She drank some water, as well as a mixture of baking soda and water, a home remedy, in an attempt to try to stem what she believed to be acid reflux. Id. at 38-39. However, this intensified her pain. Id. at 39-40. By 11 a.m., she was still in pain and decided to go to the emergency room at Lenox Hill Northwell Health, where she told the doctors that she had swallowed a fish bone the previous evening. Id. at 42-43, 49. Since her pain did not subside, the doctors performed a CT scan or MRI of her abdomen, found that there was something in her stomach which needed to be removed, and told her that she needed to be transferred to Lenox Hill's primary facility on the Upper East Side in order to have the procedure performed. Id. at 50-51. She was then transferred to the uptown facility, where a laparoscopic procedure was performed to remove the object. Id. at 53, 56-57.

Following the procedure, plaintiff's father and her roommate, who had come to the hospital, told her that the doctors had removed a piece of metal from her stomach. Id. at 54. Plaintiff never saw the metal object and, although she asked the hospital for it, she was unable to obtain it. Id. at 33-34. She believed that the doctor who removed the object gave her a picture of

it. Id. at 34-35.[1] She did not recall tasting anything metallic while dining at the restaurant. Id. at 63.

Soon after the incident, plaintiff called the restaurant and told the manager that she had swallowed a metal object which had been in her food. Id. at 31-32.

Ronald Gallo, the Chef de Cuisine, or Executive Chef, of the restaurant, testified that he was responsible for the operation of the kitchen, included hiring, training and managing staff, as well as ordering food and supplies. Doc. 24 at 11. Gallo was also responsible for the cookware and hardware used in the kitchen. Id. at 12-13. The restaurant's bass came from one of three suppliers, was portioned in six ounce filets, and was descaled and deboned. Id. at 20-22. Gallo was not familiar with the processes used by the suppliers to descale and debone the bass. Id. at 24. The restaurant rinsed and dried the bass, put it in a pan, and then put the pan in a refrigerated drawer at the "plancha" station. Id. at 20-23.[2] When a customer ordered bass, a portion of the fish was reheated and placed on top of a bed of spinach. Id. at 21.

The restaurant's line cook double checked every piece of fish for any remaining bones or scales before it was served. Id. at 22. The line cook ran his or her hands over the piece of fish with gloves to make sure there was no scaling and, if there was any scaling felt, a scaling utensil was used to remove it. Id. at 25. Any remaining bones were removed with needle nosed pliers. Id. at 22-23.

Gallo was not aware of any prior or subsequent incidents involving a diner swallowing a piece of metal. Id. at 27-28. If a customer made a complaint regarding swallowing an object in the food, either the day it occurred or thereafter, the dining room manager would have filled out

[1] Defendant's attorney annexes a photograph of the piece of metal to restaurant's motion papers, although no foundation has been laid for its admissibility. Doc. 23.
[2] "Plancha" is a Spanish word for grill or griddle.

an incident report. Id. at 31, 33. When Gallo was shown a photograph of the object removed from plaintiff's stomach, he did not recognize it as any item which he had seen in the kitchen of the restaurant. Id. at 29-30.

Plaintiff filed a note of issue and certificate of readiness on June 1, 2021. Doc. 13.

Defendant now moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. In support of the motion, defendant argues that it did not breach a duty of care to plaintiff and that any liability imposed on it herein would be based on speculation. Doc. 17. It further asserts that it cannot be liable since it had no actual or constructive notice of the presence of the piece of metal prior to the incident. Doc. 17.

In support of the motion, defendant submits the pleadings, the bill of particulars, and the deposition transcripts. It further submits the affirmation of Dr. Bradley Connor, a specialist in gastroenterology and hepatology, who incorporates by reference a report he wrote in which he concludes, within a reasonable degree of medical certainty, that the metal object did not perforate plaintiff's stomach wall, puncture her stomach, lacerate her esophagus, or cause scar tissue in the lining of her stomach. Doc. 25. He further opines that the metal object could have been in plaintiff's stomach for several days before it caused her abdominal pain, and that irritation from the object could have caused spasm and pain. Id.

In opposition to the motion, plaintiff argues that she ingested the metal object at the restaurant, that defendant was on constructive notice of the metal object, and that defendant is liable under the theory of res ipsa loquitur. Doc. 29. Plaintiff also submits the affirmation of Dr. Michael Frank, a specialist in gastroenterology and internal medicine, who opines, within a reasonable degree of medical certainty, that the pathology report (Doc. 32) reflects that a metal

object was removed from plaintiff's stomach during the endoscopy;[3]; that, based on the size of the object, it would not have been swallowed without pain in plaintiff's throat; and that the ingestion of the object most likely would have caused symptoms within hours. Doc. 31.

In reply, defendant argues that plaintiff fails to raise a triable issue of fact. Doc. 34. Defendant further asserts that plaintiff cannot rely on the doctrine of res ipsa loquitur since it was not pleaded in the complaint or bill or particulars and that, in any event, it is inapplicable herein since the restaurant did not have exclusive control over the fish, which was provided by an outside vendor. Id.

## LEGAL CONCLUSIONS

It is well settled that a party moving for summary judgment 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" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *see also* CPLR 3212 [b]). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks omitted]). Only after the moving party makes a prima facie showing does "the burden shift[ ] to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez*, 68 NY2d at 324). "The moving party's failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Vega*, 18 NY3d at 503 [citation, internal quotation marks and alterations omitted]).

[3] The pathology report identified the item removed from plaintiff's stomach as a "foreign body from fish" and described it as an "irregular piece of silver metal" measuring 2.6 cm x 0.1 cm x 0.1 cm. Doc. 32.

Defendant fails to establish its prima facie entitlement to summary judgment warranting the dismissal of the complaint since it has not established as a matter of law that: 1) plaintiff did not consume the metal object at the restaurant; 2) the metal object was in the fish consumed by plaintiff as a result of something other than defendant's negligence; and 3) the piece of metal did not cause plaintiff's injuries.

"A jury must reach its verdict based on logical inferences from the evidence, rather than on speculation" (*Silver v Quality Taste Rest., Inc.*, 11 AD3d 239 [1st Dept 2004] [citation omitted] [plaintiff failed to establish a causal connection between her ingestion of food at defendants' restaurant and her injuries]). Here, unlike the plaintiff in *Silver*, which case is relied on by defendant, plaintiff established a causal connection between the food she ate for dinner at defendant's restaurant and her injuries. As plaintiff was eating, she felt like she swallowed a large fish bone and grasped at her throat. Several hours later, during the middle of the night, she felt sharp pain in her stomach and, later that morning, she went to the emergency room, where she underwent an endoscopy which revealed that she had swallowed a piece of metal. Thus, a jury could clearly infer from the evidence that plaintiff was injured as a result of ingesting the metal object at defendant's restaurant.

Plaintiff asserts that the doctrine of res ipsa loquitur is applicable in this matter, whereas defendant argues that it is not. In order for the doctrine to apply, "(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." (*Morejon v Rais Constr. Co.*, 7 NY3d 203, 209 [2006]).

The facts of this case are similar to those in *Brumberg v. Cipriani USA, Inc.*, 110 AD3d 1198 (3d Dept. 2013). In *Brumberg*, plaintiff allegedly ingested a wood shard at a catered event in a facility operated by defendant and defendant successfully moved for summary judgment dismissing the complaint. The Appellate Division reversed, holding that, if plaintiff ingested the shard at the event, a fact finder could infer that defendant was negligent. It reasoned that "although the shard possibly could have been present when the ingredients for food were purchased from suppliers, it was not so small as to have been likely concealed and thus not visible upon careful preparation," and that "[defendant's] personnel were present in the room serving the food both butler style and at stations, thus reducing the likelihood of some third party placing the shard unseen in food." (*Brumberg,* 110 AD3d at 1201). The Appellate Division further reasoned that although an intervening party, such as a supplier or attendee at the event, may have borne responsibility for the placement of the shard, the defendant had exclusive control over the food it prepared for the purpose of res ipsa loqitur and that, had defendant done its duty, plaintiff's ingestion of the shard would have been unlikely.

As noted above, Gallo testified that defendant received fish from different suppliers, each of which descaled and deboned the fish and cut it into 6 ounce portions. However, he also testified that the restaurant's line cook: 1) double checked every piece of fish for any remaining bones or scales; 2) ran his or her hands over the piece of fish with gloves to make sure there was no scaling and, if there was any scaling felt, a scaling utensil was used to remove it; and 3) removed any remaining bones with pliers. Applying the reasoning of the Appellate Division in *Brumberg*, the defendant herein had exclusive control over the fish it prepared for the purpose of res ipsa loqitur and, had it ensured that the fish was properly prepared, it is unlikely that plaintiff would have ingested the metal object.

Defendant's argument that the doctrine of res ipsa loquitur should not be applied herein because it was not pleaded is incorrect. It is well settled that it is not necessary to plead res ipsa loquitur where the facts warrant its application (*See Silberman v Lazarowitz*, 130 AD2d 736 [2d Dept 1987]).

Additionally, "[t]he '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" (*Vitiello v Captain Bill's Restaurant*, 191 AD2d 429 [2d Dept 1993]). Given Gallo's testimony that the line cook inspected each piece of fish served at the restaurant, an issue of fact exists regarding whether he or she should have observed the metal object during the preparation of plaintiff's meal.

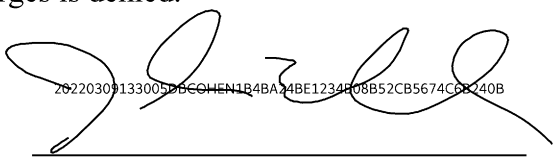
In support of its motion, defendant relies on *Russac v Crest Hollow Country Club*, 252 AD2d 548 (2d Dept 1998) which, it argues, is "directly on point." Doc. 17 at par. 50. In *Russac*, plaintiff alleged that defendant's negligence in leaving a toothpick in a shrimp he ingested was the proximate cause of his injury, a perforated intestine. The court granted summary judgment to defendant, finding plaintiff failed to establish that defendant's alleged negligence was the proximate cause of his injury. In particular, the court reasoned that plaintiff failed to establish that it was more probable than not that he ingested the toothpick while at defendant's establishment and, thus, a jury would have to engage in speculation in order to find in his favor. In contrast, plaintiff in this action testified that, as she was eating at the defendant restaurant, she grasped at her throat because she believed she was swallowing a large fish bone. Just a few hours later, she experienced severe stomach pain and a medical examination revealed that she had swallowed a metal object. Since there is evidence herein that the metal object was ingested at the restaurant

and that it caused plaintiff's injuries, the facts of this case are clearly distinguishable from those in *Russac*.

Defendant also relies on *Popham v Golden Corral Corp.*, 2007 Ohio App. LEXIS 1265 (Ct App Ohio 2007). In that case, as plaintiff ate green beans from a restaurant buffet, she felt something in her mouth and determined that the object was approximately one inch long and resembled a fish hook. Although she underwent medical treatment, no medical records linked her injuries to the incident. Plaintiff moved for summary judgment, which motion was denied on the ground that she failed to establish that the restaurant knew or should have known that the object was present in the beans, or that her claimed injuries were causally related to the object. Plaintiff appealed and the Court of Appeals of Ohio affirmed, holding, inter alia, that she failed to establish that: (1) she suffered any damages proximately caused by the occurrence, and (2) that the doctrine of res ipsa loquitur was applicable given plaintiff's failure to prove that her injuries resulted from the incident. *Popham* is also distinguishable given that plaintiff herein testified that she swallowed something she believed was a fish bone while dining at the defendant restaurant, became ill a few hours later, and then had a metal object removed from her stomach. Dr. Frank opined in his affirmation that it was his opinion, within a reasonable degree of medical certainty, that plaintiff ingested the object at the defendant restaurant. Although Dr. Connor opined that the object could have been in plaintiff's stomach for several days before she dined at the restaurant, he also admitted that irritation from the metal object could have created spasm and pain. Thus, there are at least questions of fact regarding whether the metal object was ingested by plaintiff at defendant's restaurant and whether it caused her injuries.

Accordingly, it is hereby:

ORDERED that the motion for summary judgment by defendant Jean-Georges of Pound Ridge, LLC d/b/a The Inn at Pound Ridge by Jean-Georges is denied.




3/9/2022
DATE

DAVID B. COHEN, J.S.C.

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