

Vaz v Zimmitti

2023 NY Slip Op 30345(U)

February 2, 2023

Supreme Court, Kings County

Docket Number: Index No. 509164/2019

Judge: Debra Silber

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

_____ X

JOAN MARIA VAZ,

Plaintiff,

DECISION/ORDER

-against-

Index No. 509164/2019

GIUSEPPINA ZIMMITTI,

Motion Seq. No. 2

Defendant.

_____ X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant's motion for summary judgment.

Papers	NYSCEF Doc.
Notice of Motion, Affirmations, Affidavits, and Exhibits Annexed.....	<u>30-41</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>43-44</u>
Reply Affirmation.....	<u>45-46</u>

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

In this personal injury action arising from an accident at defendant's home, the defendant moves for summary judgment and an order dismissing plaintiff's complaint, pursuant to CPLR 3212, on the grounds that defendant had no actual or constructive notice of any allegedly defective condition with regard to the subject chair. The accident took place on November 20, 2018, when the dining room chair that plaintiff was seated in broke and collapsed under her, resulting in injuries. She commenced this action shortly thereafter and asserts in her complaint that defendant was negligent as she, inter alia, failed to use the degree of care which "a prudent person would in like circumstances," despite having had actual and/or constructive notice of the dangerous and defective condition of the chair.

Defendant supports her motion with the pleadings, plaintiff's bill of particulars, the deposition transcripts of herself and of the plaintiff, an expert affidavit and report (from a "wood scientist," with photos), an affidavit from the defendant and a memo of law.

In her affidavit, which was prepared and signed in Italian, then translated for the court by a translator, defendant avers that she lives in her two family home with her son, Nicholas, who resides in the upper apartment, and that plaintiff was hired by her to be a home health aide for her husband, who passed away on September 23, 2018, two months before the plaintiff's accident. She states that "[a]fter my husband died, the plaintiff continued assisting me through January 2019. While in my home, plaintiff had full access to the dining room table and chairs" [Doc 34 ¶7]. Defendant explains that she never sat in the chair in question, as she preferred to sit in the chairs that did not have arms, so she had no actual notice of any problem with the subject chair, and that before the accident, neither plaintiff nor anyone else "expressed concern to me about any of the dining room chairs and never informed me that any of the dining room chairs were wobbly or appeared unsafe" [¶10].

Defendant's EBT was conducted on January 16, 2020, with an Italian interpreter. She testified that the plaintiff was her home health aide on the date of the accident, and worked in her home five days per week [Doc 39 Page 9]. She was shown a photo of the subject chair, and testified that she had purchased the dining room set with six chairs approximately fifty-five years prior. After the plaintiff's accident, she has had three of the six chairs moved to the basement and has not repaired them. She said the other two "were not strong enough" [Page 16] so they are in the basement along with the subject chair, which broke.

Plaintiff's EBT was also held on January 16, 2020. She testified that she was born in 1947 in Jamaica, and came to the United States in 1979. She testified that she was employed by an agency which provided hospice services and was assigned to work at defendant's home, working two to four hours per day, five days per week [Doc 38 Page 20]

to care for the defendant's husband. After defendant's husband passed away, which she believed was in September of 2017, she continued to come to care for defendant for almost another year. She was paid in cash the entire time. She could not remember defendant's name, or the name of the agency. On the date of the accident, she was seventy one years old. She was on Medicare, and she was receiving Social Security and a pension from her years working at Victory Memorial Hospital. She retired in 2013.

Plaintiff testified that some of the dining room chairs were "shaky" and "wobbly" but she is not clear from her confusing answers if she was referring to the one with arms that she sat in on the date of her accident or the other chair with arms [Page 43]. She testified that there were six chairs, but only two of them had arms. Defendant was at the dining room table and witnessed her accident, as did other guests who were present. Plaintiff describes the accident as follows: "the legs broke and the chair fell and I was on the floor" [Page 55].

Defendant's expert provides an affidavit, a report with photos, and a curriculum vitae. He describes himself as a "wood scientist." He inspected the subject chair at defendant's home on September 17, 2021, almost three years after the accident, and prepared a report. His business is named Wood Science Consulting Inc., and is based in Dutchess County, New York. He concludes that defendant could not have had actual or constructive notice of any defect in the chair, as "a visual inspection of the joint prior to the failure would not have indicated that the joint or rail was compromised or wobbly" [Doc 35], that the chair had a "slope of grain" which indicated to him a reduced bending strength, which contributed to the chair failing, and that the plaintiff weighed 220 pounds and had leaned in the chair while sitting in it, "thus resulting in the failure".

In opposition, plaintiff provides an affirmation of counsel and an affidavit and expert report from an architect [Doc 44]. He also inspected the chair, and states that “It is evident, based upon my investigation, that the property owner failed to inspect the subject chair for signs of structural fatigue prior to allowing Ms. Vaz access to it. I observed during my inspection that the front rail split where the left front leg had been secured. I also observed an excessive amount of adhesive which had been applied in the joint connection of the subject leg and the adjacent rails, indicative of a prior repair having been made. . . it is evident that, at some point in time prior to Ms. Vaz' accident, the leg had been reattached to the chair. . . Without proper repair, the chair, in its structurally compromised condition, clearly posed a risk to the safety of any individual allowed use of it.”

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; see also *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). However, a motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) and the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman*, 49 NY2d at 562).

“[T]he proponent of a summary judgment motion 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” (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez*, 68 NY2d at 324; see also *Zuckerman*, 49 NY2d at 562; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]). If the existence of an issue of fact is even arguable, summary judgment must be denied (*Phillips v Kantor & Co.*, 31 NY2d 307 [1972]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). Also, parties opposing a motion for summary judgment are entitled to every favorable inference that may be drawn from the pleadings, affidavits and competing contentions (*Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; see also *Akseizer v Kramer*, 265 AD2d 356 [2d Dept 1999]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1st Dept 1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1st Dept 1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [4th Dept 1976]). Furthermore, in determining the outcome of the motion, the court is required to accept the opponents’ contentions as true and resolve all inferences in the manner most favorable to opponents (*Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859, 862 [2d Dept 2009], citing *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; *Henderson v City of New York*, 178 AD2d 129, 130 [1st Dept 1991]; see also *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]). Moreover, a party seeking summary judgment has the burden of establishing prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of a claim or defense and not by simply pointing to gaps in the proof of an opponent (*Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2d Dept 2004]; *Katz v PRO Form Fitness*, 3 AD3d 474, 475 [2d Dept 2004]; *Kucera v Waldbaums*

Supermarkets, 304 AD2d 531, 532 [2d Dept 2003]). Lastly, “[a] motion for summary judgment ‘should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility’” (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]; see also *Benetatos v Comerford*, 78 AD3d 750, 751-752 [2d Dept 2010]; *Lopez v Beltre*, 59 AD3d 683, 685 [2009]; *Baker v D.J. Stapleton, Inc.*, 43 AD3d 839 [2d Dept 2007]).

There have been a number of cases which involve a chair which collapsed while a plaintiff was sitting on it. Sometimes, a products liability action is commenced against the manufacturer (*Kalinowski v United Chair Co., Inc.*, 173 AD3d 1611 [4th Dept 2019]; *Kovit v CVS*, 14 Misc 3d 1210[A], 2006 NY Slip Op 52466[U] [Sup Ct, Nassau County 2006]). Common law negligence is also an available cause of action. Where the chair was in a commercial establishment, the courts have generally indicated that the analysis is whether the business owner or government entity owner had actual or constructive notice of a defective condition regarding the chair (*Lawrence v Gonzalez*, 106 AD3d 462 [1st Dept 2013]; *Quinones v Federated Dept. Stores, Inc.*, 92 AD3d 931 [2d Dept 2012]; *Zalko v Sunrise Adult Health Care Ctr.*, 7 AD3d 616 [2d Dept 2004]). In a recent Court of Appeals case, however, the court opined that the business must “establish prima facie entitlement to judgment as a matter of law concerning the reasonableness of [the restaurant owner’s] inspection practices” (*Catalano v Tanner*, 23 NY3d 976 [2014] [reversing the Appellate Division decision which had concluded that in the absence of any prior complaints, incidents, accidents, or any other circumstances that should have aroused defendant’s suspicion that the chairs were defective, plaintiffs failed to raise a triable issue of fact concerning the reasonableness of defendant’s inspection practices and, thus, whether

defendant had constructive notice of the alleged defective condition of the chair]). When the cases involve a non-commercial location, such as here, the analysis is whether the homeowner had actual or constructive notice of a defective condition regarding the chair (*Levinstim v Parker*, 27 AD3d 698 [2d Dept 2006]; *Goldberger v Goldberger*, 29 AD3d 949 [2d Dept 2006]).

The court finds that defendant fails to make a prima facie case for summary judgment. As defendant provided both her EBT transcript and plaintiff's EBT transcript, and as they have conflicting factual information about the subject chair, plaintiff claiming the chair was shaky and wobbly, and defendant claiming it was not shaky or wobbly, defendant fails to make a prima facie case for summary judgment (see *Richter v Delutri*, 166 AD3d 695, 696 [2d Dept 2018]). The defendant's "wood scientist" cannot change the outcome. The defendant's inclusion of the plaintiff's testimony prevents the court from concluding that defendant has made a prima facie case for dismissal. The outcome would be no different if defendant's expert were an engineer instead of a "wood scientist". Plaintiff had been working in this home for at least six months or more before the accident, cooking and cleaning, and was familiar with the furniture. Therefore, as defendant has failed to make a prima facie case for summary judgment, the motion must be denied, and it is unnecessary to consider the sufficiency of the plaintiff's opposition papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Tiles v City of New York*, 262 AD2d 174 [1999]).

However, had defendant made a prima facie case by omitting the plaintiff's EBT transcript, the plaintiff's EBT transcript and her expert's affidavit and report would have been found sufficient to overcome the motion, create a "battle of the experts" and raise a triable issue of fact.

It is noted that *res ipsa loquitur*, which is discussed in the papers, is inapplicable. For a plaintiff to rely on the doctrine of *res ipsa loquitur*, the accident must (1) be of a kind that ordinarily does not occur in the absence of negligence, (2) be caused by an agency or instrumentality within the exclusive control of the defendant, and (3) not have been due to any voluntary action or contribution on the part of the plaintiff (*Levinstim v Parker*, 27 AD3d 698, 699 [2d Dept 2006]) [plaintiff cannot “circumvent the notice requirement by relying on *res ipsa loquitur* . . . a doctrine which has no application under the circumstances presented here”]. This claim, which is asserted in the plaintiff’s bill of particulars, is dismissed. In all other respects, however,

It is **ORDERED** that defendant’s motion for summary judgment is denied.

This constitutes the decision and order of the court.

Dated: February 2, 2023

ENTER :



Hon. Debra Silber, J.S.C.