

Katz v Bocca E. Rest.

2024 NY Slip Op 30621(U)

February 27, 2024

Supreme Court, New York County

Docket Number: Index No. 163085/2015

Judge: Verna L. Saunders

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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. VERNA L. SAUNDERS, JSC

PART 36

Justice

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INDEX NO. 163085/2015LAURA KATZ and JUDITH KATZ,
Plaintiffs,MOTION SEQ. NO. 001

- against -

BOCCA EAST RESTAURANT, LJ 202, LLC, THE BOCCA
RESTAURANT GROUP, BOCCA DI BACCO and THOMAS
VITO BIFULCO,**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 55, 56, 57, 58, 59

were read on this motion to/for

SUMMARY JUDGMENT

In this personal injury action, plaintiffs Laura Katz (“Laura”) and her mother Judith Katz (“Judith”) allege that, on November 5, 2013, while they dined at defendant Bocca East Restaurant in Manhattan (“restaurant”), a flame shot out of a flambe cheese wheel at a nearby table in which a waiter was preparing a pasta dish and severely burned Laura (NYSCEF Doc. No. 46, Exhibit C, *plaintiff’s Bill of Particulars*, ¶¶ 4, 5; NYSCEF Doc. No. 42, *Bifulco aff* ¶¶ 9, 11; NYSCEF Doc. No. 49, Exhibit F, defendant’s tr at p 44, lines 12-18). In addition to the restaurant, the complaint names LJ 202, LLC, The Bocca Restaurant Group, and Bocca di Bacco (collectively, “Bocca East”), which purportedly owned, operated, and managed the restaurant, and Thomas Vito Bifulco and Tarek Alam, who were corporate officers, partners, principal shareholders and/or owners of Bocca East, as defendants. Prior to the motion, the parties stipulated to discontinue this case as to Tarek Alam (“Alam”).¹

The complaint asserts, among other things, three causes of action: negligence against all defendants and their agents and/or employees; negligent hiring, training and supervision against all defendants and their agents and/or employees; and, “conduct . . . [that] was willful, wanton and unlawful and was done by the defendants with a wanton disregard for the life, health and safety of plaintiffs herein so as to justify the imposition of punitive damages on behalf of the plaintiffs and against the defendants” (NYSCEF Doc. No. 1, *summons and complaint*, ¶¶ 92, 93, 99). Defendants now move for an order, pursuant to CPLR 3212(e), granting partial summary judgment dismissing plaintiff’s claim for punitive damages. Plaintiffs oppose the motion. For the reasons below, the court grants the motion.

Defendants submit the deposition testimony and affidavit of Thomas Bifulco in support of their motion. Bifulco testified at deposition that he was part owner of the restaurant with Alam (NYSCEF Doc. No. 49, p 15, lines 18-24). Bifulco filled in for the manager of the

¹ On May 6, 2022, the caption was amended to reflect the discontinuance as to Alam (see NYSCEF Doc. No. 54).

restaurant on the night of the accident (*id.* at p 39, lines 17-23; NYSCEF Doc. No. 42, ¶ 4). Bifulco testified that his memory of the night in question was not clear (NYSCEF Doc. No. 49, p 45, lines 2-20).²

Bifulco alleges that the flambe style of making cacio e pepe is a “typical” way to entertain guests that also adds to the “dining ambience” (NYSCEF Doc. No. 42, ¶ 6). He explains that a parmesan cheese wheel is hollowed out to create a twelve-inch-deep bowl, the bowl is placed on a butcher block table in the middle of the dining room, and a small amount of vodka is poured into the center of the bowl (*id.* at ¶ 5; NYSCEF Doc. No. 49, p 57, lines 7-12). Then, a waiter prepares the dish tableside by igniting the vodka so that cheese melts with the half-cooked pasta (NYSCEF Doc. No. 42, ¶ 5; *see* NYSCEF Doc. No. 49, p 57, lines 13-25). Typically, the half-cooked pasta from the kitchen is placed into the bowl and extinguishes the flame (NYSCEF Doc. No. 42, ¶ 5; *see* NYSCEF Doc. No. 49, p 59, lines 8-15).

During the deposition, Bifulco watched the twenty-second long surveillance video of the incident to refresh his memory about the events (NYSCEF Doc. No. 49, p 46, lines 11-18). He contends that after he saw an open flame burning in the unattended flambe cheese wheel for no apparent reason, he walked over to the flame with a bottle of water to put out the fire (*id.* at p 55, lines 11-19; p 58, lines 12-22; p 60, lines 2-15; NYSCEF Doc. No. 42, ¶ ¶ 9, 12, 13). Bifulco does not recall whether he poured the water into the cheese wheel (NYSCEF Doc. No. 49, p 63, lines 4-8; NYSCEF Doc. No. 42, ¶ 12). He alleges that he stood in front of the cheese wheel for a few seconds and the flame shot out horizontally onto plaintiff Laura igniting her hair (NYSCEF Doc. No. 49, p. 60, lines 9-22; NYSCEF Doc. No. 42, ¶ 11). He alleges that he put his jacket around plaintiff to try to put out the flames on plaintiff Laura (NYSCEF Doc. No. 49, p 61, lines 4-8; NYSCEF Doc. No. 42, ¶ 11).

Bifulco contends that this was a freak accident (NYSCEF Doc. No. 42, ¶ ¶ 2, 15). Throughout his experience of preparing cacio e pepe and over the course of his two decades in the restaurant business, he had never observed or heard of any accidents involving flames or explosions in the flambe cheese bowl prior to this incident (NYSCEF Doc. No. 49, p 71, lines 11-25, p 72, line 2; NYSCEF Doc. No. 42, ¶ 7). Bifulco states that he was unaware of any possible risks to his customers, there was no gas or electric stove burner involved, and the only “fuel” was a mere three-fourths of an ounce of vodka (NYSCEF Doc. No. 42, ¶ 16). It never occurred to Bifulco that a flame would leap out of the bowl and harm a customer (*id.*). Bifulco testified that the restaurant stopped using the flambe method after this accident because it was “horrible, shocking and it just could not happen anymore” (NYSCEF Doc. No. 49, p 77, lines 7-16).

On a motion for summary judgment, the movant 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” (*Trustees of Columbia Univ. in the City of N.Y. v D’Agostino Supermarkets, Inc.*, 36 NY3d 69, 73-74 [2020] [internal quotation marks and citations omitted]). A motion for summary judgment “may be granted as to one or more causes of action or part thereof . . .” (CPLR 3212[e]). Once the movant makes a *prima facie* showing, the burden shifts to the nonmoving party “to establish the existence of material issues of fact

² The date of the incident was November 5, 2013. The date of Mr. Bifulco’s deposition was November 22, 2021.

which require trial of the action” (*Trustees of Columbia Univ. in the City of N.Y.*, 36 NY3d at 74 [internal quotation marks and citations omitted]). Thus, the court “must view the evidence in the light most favorable to the nonmoving party, including drawing all reasonable inferences in favor of the nonmoving party” (*Vega v Metropolitan Transp. Auth.*, 212 AD3d 587, 588 [1st Dept 2023] [internal citation omitted]). “[M]ere conclusions, expressions of hope or unsubstantiated allegations are insufficient to raise an issue of fact” (*Alpine Custom Floors, Inc. v Yurcisin*, 209 AD3d 460, 460-461 [1st Dept 2022] [internal citation omitted]).

Punitive damages are “permitted only when a defendant’s wrongdoing is not simply intentional but evince[s] a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations” (*MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 39 Misc 3d 1220[A], [Sup Ct, NY County 2013], quoting *Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 85 AD3d 457, 458 [1st Dept 2011] [internal quotation marks omitted]). “Even where there is gross negligence, punitive damages are awarded only in singularly rare cases such as cases involving an improper state of mind or malice or cases involving wrongdoing to the public” (*Maffei v A.O. Smith Water Prods. Co.*, 210 Ad3d 537, 537 [1st Dept 2022] [internal quotation marks and citation omitted]). The defendant’s alleged wrongdoing must meet “the very high threshold of moral culpability necessary to award punitive damages such as wanton or reckless disregard of plaintiff’s rights” (*Levinson v 77 Perry Realty Corp.*, 212 AD3d 464, 466 [1st Dept 2023] [internal quotation marks and citation omitted]).

In support of their motion, defendants argue that their conduct does not “[have] a high degree of moral culpability which manifests a conscious disregard of the rights of others or conduct so reckless to amount to such disregard” (NYSCEF Doc. No. 41, *affirmation in support*, ¶ 15, quoting *Chauca v Abraham*, 30 NY3d 325, 331 [2017] [internal quotation marks omitted]). Defendants aver that the accident was unexpected, they had extensive experience preparing cacio e pepe, and there had been no prior incidents like the one at issue here (*see* NYSCEF Doc. No. 41, ¶ 4; *see also* NYSCEF Doc. No. 42, ¶ 7). Defendants argue that plaintiffs have not shown “spite or malice, or a fraudulent or evil motive” to justify an award of punitive damages (NYSCEF Doc. No. 41, ¶ 16, quoting *Marinaccio v Town of Clarence*, 20 NY3d 506, 511 [2013] [internal quotation marks and citation omitted]). According to defendants, their actions do not rise to the strict standard because the pasta dish was lit with a small amount of vodka added to the cheese bowl and not with an open flame from a gas burner (*see* NYSCEF Doc. No. 41, ¶ 7; *see also* NYSCEF Doc. No. 42, ¶ 16). Defendants appear to contend that Bifulco’s efforts to put out the flame in the cheese wheel and subsequently the flames that engulfed plaintiff show that defendants were not motivated by malice and therefore, lack the “high degree of moral turpitude” necessary to impose punitive damages (NYSCEF Doc. No. 41, ¶ 21, quoting *Bothmer v Schooler, Weinstein, Minsky & Lester*, 266 AD2d 154, 154-155 [1st Dept 1999] [internal quotation marks omitted]). Further, defendants allege that it is not clear what caused the accident, so there is no proof that defendants held any malice towards plaintiffs (NYSCEF Doc. No. 41, ¶ 14). Thus, they argue, even if they did act with gross negligence – which they do not concede – this was not one of the “singularly rare cases such as cases involving an improper state of mind or malice or cases involving wrongdoing to the public” (*id.* at ¶ 19, quoting *Karen S. “Anonymous” v Streitferdt*, 172 AD2d 440, 441 [1st Dept 1991] [internal quotation marks omitted]).

In opposition, plaintiffs argue that the question of whether to award punitive damages is “primarily [a] question[] which reside[s] in the sound discretion of the jury” (NYSCEF Doc. No. 55, *plaintiffs’ attorney affirmation*, ¶ 3, quoting *Nardelli v Stamberg*, 44 NY2d 500, 503 [1978] [internal quotation marks omitted]; *Estate of Ferguson v City of New York*, 73 AD3d 649, 651 [1st Dept 2010]). Plaintiffs claim that by cooking in an “open flame cooking vessel,” defendants evinced a conscious indifference and utter disregard for the health and safety of their patrons (NYSCEF Doc. No. 55, ¶ 11). Plaintiffs further argue that Bifulco engaged in an “obviously dangerous activity” by preparing cacio e pepe in the flambe cheese bowl and that he put his restaurant patrons in danger for financial gain (NYSCEF Doc. No. 55, *plaintiffs’ attorney affirmation*, ¶ 13). According to plaintiffs, Bifulco’s statement that he noticed an open flame burning in the cheese wheel for no apparent reason is “the very definition of dangerous” (*id.* at ¶ 16). Plaintiffs argue that defendants’ “intentional disregard of the obvious nature of the hazard” of open flame cooking and their insistence on using the flambe method to make a financial profit demonstrates wanton and reckless conduct (*id.* at ¶ 17). Further, plaintiffs contend that Bifulco’s statement that he saw the dish prepared hundreds of times without incident in and of itself shows that defendants acted in a “wanton and reckless” manner because it is dangerous and thus, punitive damages are warranted here to deter defendants and others from serving the dish in this way (NYSCEF Doc. No. 55, ¶¶ 19, 20, citing Pattern Jury Instruction Section 2:278).

In reply, defendants argue that plaintiffs do not set forth legal theories or facts to support their argument that there was “aggravation or outrage, such as spite or malice, or a fraudulent or evil motive on the part of the defendants[s], or such a conscious and deliberate disregard of the interest of others that the conduct may be called willful or wanton” (NYSCEF Doc. No. 58, *affirmation in reply*, ¶¶ 3, 4, quoting *Dupree v Giugliano*, 20 NY3d 921, 924 [2012] [internal quotation marks omitted]). Defendants argue that plaintiffs’ reliance on one case, *Nardelli v Stamberg*, is misplaced. In *Nardelli*, the Court of Appeals held that the Appellate Division wrongly concluded that plaintiff was not entitled to punitive damages as a matter of law because “the actual malice necessary to support an action for malicious prosecution also serves to justify an award of exemplary damages” (NYSCEF Doc. No. 58, ¶ 2, quoting *Nardelli*, 44 NY2d at 503). Defendants state that here, in a negligence action, malice is not a prerequisite.

In addition, defendants argue that plaintiffs do not set forth facts or expert opinion to support their allegation that tableside flambe cooking is inherently dangerous. Defendants asks the court to take judicial notice that tableside flambe dishes are a common occurrence in the culinary industry.³ Defendants argue that the extent of plaintiffs’ injuries is not determinative⁴ but rather the nature of defendants’ actions and their state of mind are relevant to the issue of punitive damages and thus, plaintiffs fail to show defendants’ conduct was “willful or wanton” (NYSCEF Doc. No. 58, ¶ 12, quoting *Prozeralik v Capital Cities Communications, Inc.*, 82 NY2d 466, 479 [1993] [internal quotation marks and citation omitted]). Hence, defendants argue their conduct does not satisfy the strict standard (NYSCEF Doc. No. 58, ¶ 15).

³ Defendants cite to website articles by The Food Network; Gourmet Magazine; and Tableside Theatre (*see* NYSCEF Doc. No. 58, ¶¶ 8-10).

⁴ Defendants submit an excerpt of plaintiff Laura’s deposition transcript wherein she testifies that she does not have any physical scars (*see* NYSCEF Doc. No. 59, Exhibit A).

Here, defendants correctly argue that plaintiffs have not satisfied their burden of establishing that defendants' conduct showed a "reckless disregard for the rights of others or smack of intentional wrongdoing" (*Gonzalez v 231 Ocean Assoc.*, 131 AD3d 871, 872 [1st Dept 2015] [internal quotation marks and citation]). Further, plaintiffs fail to allege any conduct by defendants that is "unusual or extraordinary" sufficient to warrant punitive damages (*id.*). Plaintiffs also have not offered any evidence that the alleged negligent conduct by defendants was "motivated by malice and spite [sufficient] to raise a material issue of fact about whether punitive damages should be awarded" (*Theroux v Resnicow*, 80 Misc3d 1202[A], [Sup Ct, NY County 2023]). Here, defendants have shown that there were no prior incidents at the subject restaurants, or any of defendants' restaurants for that matter, therefore defendants could not have had notice of a potential problem with the flambe cheese bowl (see *Sclafani v Brother Jimmy's BBQ, Inc.*, 88 AD3d 515, 516 [1st Dept 2011]). Also, the deterrent effect of awarding punitive damages is not an issue here since defendants immediately stopped utilizing the flambe cheese bowl after the subject incident (*id.*). For all these reasons, the court concludes that plaintiffs have failed to show that defendants' conduct rises to that "singularly rare case" that is motivated by an improper mind or resulted in public harm; therefore, an award of punitive damages is not warranted (*Hauerstock v Barclay St. Realty LLC*, 168 AD3d 519, 520 [1st Dept 2019]); see also *Karen S. "Anonymous,"* 172 AD2d at 441). As such, defendants have established as a matter of law that punitive damages are not recoverable (see *Cohen v Lake Tree Vil. Homeowners' Assn.*, 254 AD2d 696, 696 [4th Dept 1998]).

Contrary to plaintiffs' assertion, a motion for partial summary judgment may address striking plaintiffs' demand for punitive damages (see *Arana v AO Smith Water Prods. Co.*, 210 AD3d 517, 518 [1st Dept 2022]; see also *Karen S. "Anonymous,"* 172 AD2d at 441). Plaintiffs' reliance on *Nardelli v Stamberg* is misplaced, as plaintiffs have not raised a triable issue as to malice or wanton (see *Arana*, 210 AD3d at 518). Plaintiffs' claim that defendants engaged in willful and wanton conduct by cooking with an open flame lacks merit because, as stated, plaintiffs do not bolster this claim with legal or factual support (*SJWA LLC v Father Realty Corp.*, 221 AD3d 552, 554 [1st Dept 2023]). The court notes that the parties also debate the issue of whether the court should consider plaintiffs' informal request to issue an order for defendants to appear in court with their adjuster or that the court enforce a prior Order dated November 25, 2019, directing the parties to engage in settlement negotiations.⁵ However, plaintiffs did not cross-move for affirmative relief. Therefore, the court does not consider this request (see CPLR § 2215). Even if the court were to consider the arguments, it would conclude that the relief sought is not related to the relief sought in the defendants' motion, not clearly articulated in plaintiffs' papers, and it is not necessary for the court to exercise discretion to entertain such requests for affirmative relief (see *Trevino v Pray*, 217 AD3d 592, 593 [1st Dept 2023]). Accordingly, it is hereby

ORDERED that defendant's motion for partial summary judgment dismissing all claims for punitive damages is granted; and it is further

ORDERED that these claims are severed and dismissed; and it is further

⁵ Plaintiffs annexed the prior court order to their opposition papers as NYSCEF Doc. No. 56, Exhibit A.

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for defendants shall serve a copy of this decision and order, with notice of entry, upon plaintiff.

This constitutes the decision and order of this court.

February 27, 2024



HON. VERNA L. SAUNDERS, JSC

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