SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

YUNE RHEE,

Plaintiff,

- against -

DJ'S INTERNATIONAL BUFFET,

Defendant.

Index No.: 27137/2010

Motion Date: 06/14/12

Motion No.: 32

Motion Seq.: 1

- x

The following papers numbered 1 to 18 were read on this motion by defendant, DJ'S INTERNATIONAL BUFFET, for an order pursuant to CPLR 3212(b) granting summary judgment in favor of defendant and dismissing the plaintiff's complaint:

Papers Numbered

Notice of Motion-Affidavits-Exhibits.....1 - 10
Affirmation in Opposition-Affidavits-Exhibits.....11 - 16
Reply affirmation.....17 - 18

This is an action for damages for personal injuries sustained by the plaintiff, Yune Rhee, on September 11, 2009, when she injured her hand while dining at the premises owned by defendant DJ's International Buffet, located at 1100 Stewart Avenue, Garden City, Nassau County, New York. According to the plaintiff's bill of particulars, while attempting to pull her chair underneath her, the plaintiff caught her finger between a loosened seat cushion and the metal frame of the chair which supports the cushion. Plaintiff alleges that as a result of the the loosening of the seat cushion and the gap between the metal frame and the seat cushion the plaintiff caught her finger in the gap and severed the ring finger of her left hand.

The plaintiff commenced this action by filing a summons and complaint on October 27, 2010. Issue was joined on December 2, 1010 by service of the defendant's verified answer. A note of issue and certificate of readiness were filed on January 19, 2012. Plaintiff alleges that the defendant was negligent in causing or allowing the chair to become and remain in a dangerous, unsafe and hazardous condition and in causing a trap-like dangerous and unreasonably hazardous condition and that defendant should have know in the exercise of reasonable care of the hazardous condition and rectified same.

The defendant now moves for an order pursuant to CPLR 3212(b), granting summary judgment on the issue of liability and dismissing the complaint. The defendant contends that it did not create, or have actual or constructive notice of the alleged dangerous condition. Defendant asserts that there is no evidence in the record which would tend to show that the defendant knew that there was a defect in the chair. Defendant alleges that there is no evidence in the record that a dangerous condition existed before the plaintiff sat in the chair.

In support of the motion for summary judgment, defendant submits the affirmation of counsel, Robert M. Levine, Esq., a copy of the pleadings, the plaintiff's bill of particulars, photographs of the chair in question; and copies of the examinations before trial of the plaintiff, Yune Rhee, defendant by Justin Jiang and non-party witness David Bon Rahee.

At her examination before trial, taken on October 14, 2011, plaintiff, age 61, testified that she is a volunteer assistant pastor at a church and also works as a real estate salesperson. She testified that on the day of the accident, September 11, 2009, she and her husband decided to go to defendant's restaurant for lunch. She stated that they entered the restaurant and paid for the buffet. She then proceeded to the buffet to get food, carried her tray to an empty table and sat down. She described the chair as having a red vinyl seat cushion and a black metal frame. In describing the accident, she stated, "since I was a little bit apart from the table, so I pulled the chair up. So I grabbed the seat, and then I pulled forward. I pulled towards the table to eat right next to the table." She stated that she grabbed the chair on the middle of each side next to the seat cushion. As she pulled the chair forward she stood up a bit and as she began to sit she noticed that her finger had been cut. She looked down at the chair and saw that the front of seat cushion was separated or detached from the frame. The tip of her left ring finger was detached approximately halfway into the nail. She stated that her finger was stuck in a narrow gap between the

front of the seat cushion and the frame of the chair. She approached the counter and asked someone to call an ambulance. She left the scene in an ambulance which transported her to the emergency room at Nassau County Hospital where her finger was reattached.

Defendant also submitted the deposition testimony of Justin Jiang, who was working as the manager at DJ's International on the date of the plaintiff's accident. He became aware of the accident when the plaintiff and her husband came to the cashier area. Plaintiff told Jiang that her finger was cut by the chair and he immediately went over to examine the chair. He testified that he flipped the chair over stating, "I find it was a loose screw. There was a screw missing. " He stated that the missing screw was used to attach the seat to the frame. He stated that of the four screws used to secure the seat, the screw in the right front was missing. The following day he inspected all of the chairs.

He testified that prior to this incident no one was ever injured on a chair in the restaurant. He stated that prior to the accident he was not aware that the screw was missing and he had no reason to believe that there was a defect in any of the chairs at the restaurant. When asked if at any time prior to the accident the chairs were inspected, he stated that " we clean the carpet once every month because then we have to put the chairs on the table. At that time we inspect it, the chair." When the company comes to clean the carpet the chairs are put upside down on the table by the waiters and waitresses. He stated that after the chairs are put on the tables, he personally inspects the chairs. When asked when the last time was that the company came to clean the carpet prior to the accident, he stated, "maybe two weeks before."

The defendant also submits a copy of the examination before trial of the plaintiff's husband David Rahee, age 70, taken on January 6, 2012. He testified that he is a pastor at the Lord's Vision Community Church. He stated that the date of his wife's accident was the first time he patronized the defendant's restaurant. When they arrived they were directed to a table where they sat down. He and his wife then got up to go to the buffet. When they returned to their table, his wife pulled in her chair and he then observed her finger was bleeding. He observed the vinyl portion of the chair lifted up away from the metal frame.

Defendant contends that the deposition testimony of the plaintiff and the restaurant manager do not substantiate the plaintiff's contention that the store created or had actual or

constructive notice of the allegedly dangerous condition (citing Miles v Hicksville U.F.S.D., 56 AD3d 625[2d Dept. 2008]; Dulgov v City of New York, 33 AD 3d 584 [2d Dept. 2006]; Loiacono v. Stuyvesant Bagels, Inc., 29 AD3d 537 [2d Dept. 2006]). Counsel also asserts that a missing screw would not have been detected by any reasonable inspection of the chair as the screws were at the bottom of the chair which were only visible once a month when the chairs were placed upside down on the tables so the carpets could be cleaned. Defendant also alleges that the plaintiff may not rely on the doctrine of res ipsa loquitor as the chair, located in a restaurant open to the public where innumerable patrons had access to the chair, was under the defendants' exclusive control (see Hardesty v Slice of Harlem, II, LLC, 79 AD3d 472 [1st Dept. 2010]; Miles v Hicksville U.F.S.D., 56 AD3d 625 [2d Dept. 2008]).

Counsel claims that there no were no prior injuries or complaints regarding the subject chair and no evidence as to how long the alleged dangerous condition existed. Defendant claims that there is no proof as to how long the screw was missing from the chair and that it might have come lose just prior to the accident. Defendant claims, based upon Jiang's testimony that the chairs were inspected at least two weeks prior to the accident and therefore defendant has sufficiently shown, prima facie that it did not have actual or constructive notice of the hazardous condition (citing Levinstim v Parker, 27 AD3d 698[2d Dept. 2006]).

In opposition, plaintiff's counsel, Scott A. Edley, Esq., submits his own affirmation as well as a copy of plaintiff's EBT transcript, Mr. Jiang's transcript and David Rahee's transcript. Plaintiff asserts that the deposition testimony of the parties demonstrates that the defendant failed to make a prima facie showing of entitlement to judgment as a matter of law because there are triable issues of fact as to whether or not the defendant had constructive notice of the dangerous condition of the chair. Counsel contends that although Mr. Jiang testified that he inspected the chairs in the restaurant two weeks prior to the accident he stated that his inspection is intuitive in that he can spot defects in the chairs and tell whether or not they are stable. Plaintiff states that viewing the evidence in the light most favorable to the non-moving party there is a question as to whether Mr. Jiang's allegedly perfunctory and cursory inspection was reasonable under the circumstances. Further, counsel contends that although the defendant stated that the chairs are inspected only when they are placed on top of the tables on the occasions when the carpets are cleaned, the defendant failed to produce any records to show that the carpets were in fact cleaned two weeks prior to the accident.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position (see Zuckerman v City of New York, 49 NY2d 557[1980]).

A property owner is subject to liability for a defective condition on its premises if a plaintiff demonstrates that the owner either created the alleged defect or had actual or constructive notice of it (see Betz v Daniel Conti, Inc., 69 AD3d 545 [2d Dept. 2010]; Roy v City of New York, 65 AD3d 1030 [2009]). A defendant owner or entity who is responsible for maintaining a premises who moves for summary judgment in a case involving a defective condition on the property has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (see Schnell v Fitzgerald, 95 AD3d 1295 [2d Dept. 2012]).

Upon review and consideration of the defendant's motion, the plaintiff's affirmation in opposition, and the defendant's reply thereto, this court finds that the evidence submitted by the defendant was not sufficient to demonstrate, prima facie, that the defendant did not have constructive notice of defective condition of the chair prior to the plaintiff's accident.

This Court agrees with the plaintiff that there is a question of fact as to the nature and reasonableness of the inspection conducted by Mr. Jiang. In his examination before trial, when asked how he conducted his inspection of each chair he stated, "I know sometimes I touch it to feel whether it was stable." When asked if he touched a specific chair or table he stated, "Its like natural. I have like a habit. I can see. It's something I am able to spot, something intuitive." When asked if he saw something wrong if he would touch it or shake it he stated, "No. Usually I do it. I do it with or without questioning each chair or table."

This court finds that there is a question as to whether the defect was discoverable by reasonable inspection and whether Mr. Jiang's manner of inspection of each chair in the restaurant every month was adequate and reasonable. Therefore, this Court finds that there is a question of fact as to whether the defendant failed in its obligation to make a reasonable

inspection (see Hoffman v United Methodist Church, 76 AD3d 541[2d Dept. 2010]; Colon v Bet Torah, Inc., 66 AD3d 731 [2d Dept. 2009][if a reasonable inspection would have disclosed the dangerous condition, the failure to make such an inspection constitutes negligence and may make the owner liable for injuries proximately caused by the condition]). In addition, the Court finds that the defendant failed to sufficiently document when the last inspection took place. Although he stated that the chairs are inspected only when the carpets are cleaned, there was no evidence produced as to when the carpets were last cleaned or exactly when the last inspection of the chairs took place. Therefore, defendant failed to establish as a matter of law that the defect did not exist for a sufficient period of time to allow defendant to discover and remedy it [see Seivert v Kingpin Enters., Inc., 55 AD3d 1406 [4th Dept. 2008])

Thus, absent specific evidence of when the chair was last inspected, the reasonableness of the inspection, or that an inspection would not have disclosed the defect, the defendant has failed to establish that it lacked constructive notice of the chair's allegedly defective or dangerous condition or that it was free of negligence with respect to it (see Oates v Iacovelli, 80 AD3d 1059 [3d Dept. 2011]; White v Village of Port Chester, 84 AD3d 946 [2d Dept. 2011]; Colon v Bet Torah, Inc., 66 AD3d 731 [2d Dept. 2009]; cf. Lee v. Bethel First Pentecostal Church of Am., Inc., 304 AD2d 798 [2d Dept. 2003]).

As defendant failed to establish its entitlement to judgment as a matter of law, it is not necessay to consider the sufficiency of the opposition papers submitted by the plaintiff (see Giraldo v Twins Ambulette Serv., Inc., 946 NYS2d 871 [2d Dept. 2012]; King v 230 Park Owners Corp., 95 AD3d 1079[2d Dept. 2012]; Hill v Fence Man, Inc., 78 AD3d 1002 [2d Dept. 2010]).

Accordingly, for all of the above stated reasons, it is hereby

ORDERED, that the defendant's motion for summary judgment is denied.

Dated: August 21, 2012
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.