SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Brigantti

X

ALICE HENRYHAND,

DECISION/ORDER

Plaintiff,

-against- Index No.: 20057/2015E

MANHATTAN BEER DISTRIBUTORS, LLC., et als.

Defendants.

X

The following papers numbered 1 to 4 read on the below motion noticed on July 5, 2016 and duly submitted on the Part IA15 Motion calendar of **August 4, 2016**:

Papers Submitted	Numbered
Pl. Aff. In Support, Exhibits	1,2
Defs' Aff. In Opposition, exhibits	3
Pl.'s Reply Aff.	4

Upon the foregoing papers, the plaintiff Alice Henryhand ("Plaintiff") moves for an order (1) pursuant to CPLR 3212, granting partial summary judgment in her favor against the defendants on the issue of liability, pursuant to the doctrine of *res ipsa loquitur*, and (2) an order amending the complaint to substitute the defendant "Jimmy Hojas" for the defendant previously named "John Doe, first and last names being fictitious." Defendant Manhattan Beer Distributors, LLC ("Defendant") opposes that branch of the motion seeking partial summary judgment on the issue of liability.

I. Background

This matter arises out of an alleged incident that occurred on June 3, 2014, on the sidewalk at or near 36 West 138th Street in New York, New York. Plaintiff alleges that she was walking down the sidewalk when a truck owned by Defendant and operated by its employee, Jimmy Hojas ("Hojas") passed by and struck a speed bump. As it did so, several kegs of beer fell off of the truck through an unsecured door. Plaintiff states that at least two of these kegs struck her and pinned her against a nearby fence. At her deposition, Plaintiff testified that she

saw the truck bay door "fly open" and saw two beer kegs fall off and roll up the sidewalk. The kegs fell off of the truck so quickly that she did not have time to react. As a result, Plaintiff allegedly fractured her shoulder as well as three vertebrae in her spine.

Plaintiff alleges that Defendant maintained exclusive use and control over the truck, and it is not disputed that this incident occurred because the beer kegs and the door of the truck were inadequately secured. Further, the deposition testimony reveals that only employees of the Defendant would secure beer kegs and lock the doors of the truck. Plaintiff provides testimony from Hojas and a co-worker Ramon Ramirez asserting that kegs could not have rolled out of the truck had they been properly secured on pallets, and if the bay door/gate had been securely locked.

Hojas testified that after he hit the speed bump and was waved down by a pedestrian, he looked and saw two smaller beer kegs "in the gutter." He said that one of these kegs was on the curb next to the sidewalk, and the other was "right next to it." Hojas authenticated an MV-104 accident report allegedly drafted by responding police officers. This report stated that a "barrel nearly missed a pedestrian, but forced her to get out of its way and fall." Plaintiff supplies a "police aided report" drafted by another officer, stating among other things that "...keg hit aided legs. This caused aided to fall and hit her left shoulder on metal gate..." Plaintiff also provides the deposition testimony of non-party witness Mary Short. Ms. Short testified that she heard a loud noise as the truck hit the speed bump, and she heard what must have been barrels coming out and hitting the ground. She then turned around and saw Plaintiff against a metal fence. Ms. Short noticed approximately three kegs that were close to Plaintiff, and others were "rolling down the street." She called 9-1-1 and told the operator that an "elderly lady was hit by barrels, and she was on the ground."

Plaintiff now moves for partial summary judgment on the issue of Defendant's liability under the theory of *res ipsa loquitur*. Plaintiff contends that she has satisfied all three elements of the doctrine, and it is not disputed that this accident occurred due to Defendant's negligence, and there is no evidence that Plaintiff in any way contributed to this accident.

In opposition to the motion, Defendant argues that there is an issue of fact as to whether or not a keg of beer actually struck Plaintiff, or if Plaintiff's injuries are instead the result of tripping over her own feet. Hojas testified that after stopping his truck, he observed two kegs resting on or near the curb, and not on the sidewalk. Plaintiff informed him that she heard the

noise and ran and tripped over her own feet. Hojas stated that if the kegs had actually come into contact with Plaintiff's legs, she would have sustained injuries to her legs. Defendant further notes that Mary Short did not actually witness the accident. Defendant argues that under these circumstances, a jury could find that Plaintiff herself contributed to her accident and injuries, thus eliminating Plaintiff's ability to apply the doctrine of *res ipsa loquitur*. Defendant asserts that there are conflicting accounts of this accident and this case entirely rests upon the credibility of the witnesses.

In reply, Plaintiff asserts, *inter alia*, that there is no evidence of comparative negligence here because she was confronted by a sudden and unexpected emergency that was not of her own making. Accordingly, even accepting the Defendant's contention that Plaintiff was not struck by the barrels, but rather she sustained injuries while trying to avoid them, Defendant's negligence was the sole proximate cause of this accident. There is no evidence of any other cause of this accident besides the beer kegs falling from Defendant's unsecured truck.

II. Standard of Review

To be entitled to the "drastic" remedy of summary judgment, the moving party "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 from the case." (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC.*, 101 A.D.3d 490 [1st Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738 [1993]).

III. Standard of Review

A plaintiff sufficiently invokes the theory of *res ipsa loquitur* upon establishing the following three elements: (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, (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff (*see Kambat v. St. Francis Hosp.*, 89 N.Y.2d 489 [1997]). Satisfaction of the three elements alone, generally, only permits the inference of defendant's negligence to be drawn on the circumstance of the occurrence. The jury may - but is not required to - draw the permissible inference (*see Dermatossian v. New York City Tr. Auth.*, 67 N.Y.2d 219) [1986]). This is true even where plaintiff's circumstantial evidence is unrefuted (*Morejon v. Rais Constr. Co.*, 7 N.Y.3d 203, 207-209 [2006]). In some instances, summary judgment may be granted in favor of a plaintiff predicated on the theory of *res ipsa loquitur*. However, as elucidated by the Court of Appeals, "only in the rarest of res ipsa loquitur cases may a plaintiff win summary judgment ... That would happen only when the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable" (*Morejon v. Rais Constr. Co.*, 7 N.Y.3d 203, 207-209 [2006]). Plaintiff may only prevail in the "exceptional case in which no facts are left for determination" (*Id.*).

In this matter, even assuming for purposes of the motion that Plaintiff has satisfied the elements above, there remain facts "left for determination" and therefore Plaintiff is not entitled to summary judgment. Where there are conflicting accounts of how an accident occurred or whether the plaintiff suffered an injury as a result thereof, summary judgment may not be granted to the plaintiff on *res ipsa loquitur* grounds (*see, e.g., Aponte v. City of New York*, 2016 WL 6078773 [1st Dept. 2016]). In support of her motion for summary judgment, Plaintiff states in an affidavit that she was "struck by at least two of the kegs as I walked and I was pinned against a nearby fence, sustaining injuries to my spine and shoulder." However, Mr. Hojas testified that when he spoke to Plaintiff after the incident, she told him that "she heard the noise and she ran and she tripped over her own feet and she hit the gate — the fence" (Hojas EBT at 75:8-15). Plaintiff's alleged post-accident statement to Hojas is admissible (*see Delgado v. Martinez Family Auto*, 113 A.D.3d 426, 427 [1st Dept. 2014]). Hojas further testified that he did not see any kegs on the sidewalk, and he noted that if the kegs actually struck Plaintiff's legs, her legs would have been seriously injured (*id* at 76; 92). The MV-104

police report that Hojas signed stated that a barrel narrowly missed plaintiff, and she fell when she was forced to get out of its way. In light of the foregoing, the record reflects two different versions of this accident.

Plaintiff argues that even accepting the Defendant's version of events – that plaintiff was not actually struck by the barrels, but she fell as she attempted to avoid them – the emergency doctrine would absolve Plaintiff of any potential comparative negligence and thus she is still entitled to summary judgment on the issue of liability. However, the inconsistent accounts of precisely how this accident occurred raise an issue of fact as to Plaintiff's credibility that may not be resolved on summary judgment (*see Hutchings v. Yuter*, 108 A.D.3d 416 [1st Dept. 2013], citing *Alvarez v. New York City Housing Authority*, 295 A.D.2d 225 [1st Dept. 2002]). None of the other witnesses actually saw a barrel strike Plaintiff. Mary Short admitted that she only observed Plaintiff "after the fact" (Short EBT at 21:19-22), and Mr. Hojas did not see any barrels on the sidewalk (Hojas at 76). The "police aided report" submitted in support of the motion was drafted by a non-eyewitness officer. Where a plaintiff is the sole witness to an accident, an issue of fact may exist where he or she provides inconsistent accounts of the accident, or his or her credibility is otherwise called into question with regard to the accident (*see Smigielski v. Teachers Ins. and Annuity Ass'n of America*, 137 A.D.3d 676 [1st Dept. 2016]).

IV. Conclusion

Accordingly, it is hereby

ORDERED, that Plaintiff's motion for partial summary judgment on the issue of Defendants' liabiltiy is denied, and it is further,

ORDERED, that Plaintiff's motion to amend the caption to replace defendant "John Doe" with "Jimmy Hojas" is granted, and Plaintiff is directed to file and serve an amended complaint within 30 days after service of a copy of this Order with Notice of Entry. Defendant is to interpose an answer on behalf of Hojas within 30 days after service of the amended complaint.

This constitutes the Decision and Order of this Court.

Dated: 11/28/16

Hon. Mary Ann Brigantti, J.S.C.