| **Govenar v Brushstroke** |
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| 2017 NY Slip Op 31959(U) |
| September 14, 2017 |
| Supreme Court, New York County |
| Docket Number: 160114/2013 |
| Judge: Arlene P. Bluth |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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JODY GOVENAR,

Plaintiff,

-against-

BRUSHSTROKE, BOJI D/B/A BRUSHSTROKE, BOULEY DUANE STREET D/B/A BOULEY RESTAURANT, ACTION CARTING ENVIRONMENTAL SERVICES, INC., ONE HUDSON PARK ASSOC LLC, ABBEVILLE PRESS INC, ONE HUDSON PARK INC, A&L CESSPOOL SERVICE CORP., SCIENTIFIC FIRE PREVENTION CO., NEW YORK NAUTICAL INSTRUMENT & SERVICE CORP., THE ANDREWS ORGANIZATION, INC.

Defendants.
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**DECISION & ORDER**
**Index No. 160114/2013**

Mot. Seq. 16,22,23,26

Motion Sequence numbers 16, 22, 23 and 26 are consolidated for disposition. The motions for summary judgment by defendants Action Carting Environmental Services, Inc. ("Action'), Bouley Duane Street d/b/a Bouley Restaurant ("Bouley") and Boji LLC d/b/a Brushstroke, i/s/h/a Boji d/b/a Brushstroke and i/s/h/a Brushstroke ("Brushstroke") (motion sequence numbers 16, 22, and 26 respectively) are denied. The motion by defendant New York Nautical Instrument & Service Corp. ("New York Nautical") for summary judgment is granted.

**Background**

This action arises out of alleged injuries suffered by plaintiff on the sidewalk near 30 Hudson Street, New York, New York on July 28, 2013. Defendant Brushstroke operates a restaurant at 30 Hudson Street right next door to New York Nautical– a map store. Defendant

Bouley operates a restaurant across the street from Brushstroke and Action picks up garbage bags from both restaurants. Action picked up garbage bags from both Brushstroke and Bouley the night before plaintiff's accident. The parties dispute the origin of the grease that allegedly cause plaintiff to slip and fall.

Defendant Action moves for summary judgment dismissing all claims and cross-claims against it on the grounds that Action does not own the sidewalk where plaintiff slipped and did not cause or create the condition that led to plaintiff's injuries.

Action relies heavily on the affidavit of Mr. Barthelmy, an Action employee, who claims that on the night of the accident he did not observe any leaking garbage bags as he loaded the refuse into the truck. Barthelmy insists there was no liquid on the ground when he left the pickup site (at around 2 a.m.) with Mr. Tucker (a former Action employee working that night). Action stresses that the restaurants, defendants Bouley and Brushstroke, were not permitted to dispose of liquid garbage with Action. Action was only supposed to take away solid garbage.

In opposition, plaintiff offers the affidavit of Tucker (the other Action employee with Barthelmy that night). Tucker claims that the bags were leaking on the night before the accident and liquid spilled out onto the sidewalk.

Action and other defendants object to the absence of the certificate of conformity for the Tucker affidavit (Tucker affirmed the contents of the affidavit in New Jersey) and claim it cannot be considered. Plaintiff eventually submitted two certificates of conformity in an attempt to comply with CPLR 2309[c]. Plaintiff stresses that it was entitled to correct the defect *nunc pro tunc* and it has now submitted an affidavit in accordance with the CPLR.

**Discussion**

To be entitled to the 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 Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York,* 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee,* 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

**The Tucker Affidavit**

A critical component to three of the four instant motions is the admissibility of the Tucker affidavit offered by plaintiff. The defendants opposing the admission of this affidavit claim it failed to comply with CPLR 2309[c]. Plaintiff concedes that the first iteration of the affidavit was insufficient because it failed to include the required certificate of conformity. Plaintiff

insists that the certificate of conformity offered by John Blyth, Esq. was sufficient to render the affidavit permissible. After the Court expressed hesitation with that certificate of conformity, plaintiff offered additional papers on the matter, including an new certificate of conformity.

CPLR 2309[c] provides that an "oath or affirmation taken without the state shall be treated as if taken within the state if it is accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded within the state if such deed had been acknowledged before the officer who administered the oath or affirmation."

"The obvious purpose of CPLR 2309[c] is to assure that documents executed outside of New York, perhaps under different standards or procedures, are executed in a manner that meets New York's reliability standards, as equivalent to the execution requirements for the recording of a deed" (*Midfirst Bank v Agho*, 121 AD3d 343, 348, 991 NYS2d 623 [2d Dept 2014]). The certificate of conformity must contain language acknowledging that the oath administered outside of New York was taken in accordance with the laws of that state or the law of New York (*id.* at 348-49).

Plaintiff omitted a certification of conformity and later submitted one by John Blyth that claims that he witnessed the signature of Mr. Tucker as applied to the affidavit (NYSCEF Doc. No. 459). Plaintiff insists that this certificate of conformity was sufficient and that CPLR 2309[c] does not require a certifying attorney to be physically present without the state (*see* NYSCEF Doc. No. 583 at 2). While plaintiff is correct that a plain reading of CPLR 2309[c] does not require that an attorney be physically present when the document is actually signed, the Court took issue (at oral argument) with the fact that the certificate of conformity stated that Mr. Blyth had witnessed Mr. Tucker sign the affidavit.

In her supplemental papers on this issue, plaintiff does not directly state if Mr. Blyth actually witnessed the signature– plaintiff only argues that an attorney offering the certificate of conformity need not witness the signature. This Court's primary concern with the Blyth certificate of conformity was whether it contained a false statement– that Mr. Blyth witnessed Tucker sign his affidavit. The fact that it was not necessary is besides the point; an attorney cannot submit a certificate of conformity with an inaccurate statement.

However, the amended certificate of conformity offered by plaintiff, by Joseph Cammarata, Esq., complies with CPLR 2309[c] and the Tucker affidavit is admissible. This Court can consider a certificate of conformity *nunc pro tunc* even if it was previously omitted (*Bank of New York v Singh*, 139 AD3d 486, 487, 33 NYS3d 1 [1st Dept 2016]); *see also DaSilva v KS Realty, L.P.*, 138 AD3d 619, 620, 30 NYS3d 85 [1st Dept 2016] [finding that defendants' failure to submit a certificate of conformity was a "mere irregularity" the Supreme Court properly excused, particularly because defendants provided a corrected copy]). The fact is that no party disputes that the Tucker affidavit was sworn before a notary public in New Jersey. No party disputes that the purported notary, Stuart Schwartz, was an authorized notary when Tucker signed the affidavit. No party contends that Tucker's signature or Schwartz's signature were forged and no party argues that Tucker's statements were fraudulently procured. Under these circumstances, the Court sees no reason why the revised certificate of conformity could not be considered *nunc pro tunc*– although defendants disagree with the contents of Tucker's affidvait, there is no prejudice to defendants.

Defendants offer no case law in support of the claim that the attorney submitting a certificate of conformity must detail conversations with the affiant or the notary and this Court

will not create new requirements under CPLR 2309[c]. While the Cammarata certificate could have been worded more clearly and included more details, the purpose of the certificate of conformity is to ensure that the out-of-state affidavit conforms with that state's laws or New York's laws. Here, the Cammarata certificate of conformity properly confirms that Stuart Schwartz was an authorized officer (a notary) permitted to administer an oath.

**Action's Motion (Mot Seq 16)**

The Court denies Action's motion for summary judgment because there are issues of fact stemming from the Tucker affidavit. Tucker claims that he saw liquids leaking and spilling out of the bags in front of Brushstroke that night, as he had on many previous occasions (Tucker aff, ¶¶ 7-12) Tucker claims that he thought workers for Bouley and Brushstroke would clean the mess up (*id.* at 15). This creates an issue of fact as to whether Action was liable for creating the dangerous condition by leaving the sidewalk covered with oil and grease. Obviously, this testimony conflicts with the affidavit of Barthelmy, who insists that there were no leaks or spills when he picked up garbage the night before the accident.[1] A jury must decide whether they believe Barthelmy, Tucker, or possibly neither of these accounts.

[1]It appears that after the papers were filed in support of this motion, a deposition of Barthelmy occurred. However, this Court cannot consider that deposition in connection with Action's motion.

**Bouley's Motion (Mot Seq 22)**

Bouley moves for summary judgment on the ground that it did not have a duty to maintain the sidewalk where plaintiff's accident occurred and it did not create the alleged condition.

In opposition, plaintiff claims that Bouley caused and contributed to the dangerous condition.

As an initial matter, the Court notes that Bouley's restaurant is located on the opposite side of the street from where the accident (and the spill) occurred. Therefore, Bouley may only be liable if it created (or contributed) to the spill– obviously, Bouley could not have a duty to correct a dangerous condition on the sidewalk across the street that it did not create.

Here, the deposition testimony of Action's witness, Mr. O'Connell, demonstrates that Bouley and Brushstroke's garbage bags were routinely picked up together from the same location (O'Connell tr at 26-28). Barthelmy also testified that although there were bags on both sides of the street the night before the accident, the garbage bags from Bouley and Brushstroke were mixed (Barthelmy tr at 48-49). These accounts create an issue of fact– if the oil spill Tucker insists he witnessed came from the garbage bags, then it might have come from either a Bouley or Brushstroke garbage bag. Therefore, Bouley's motion for summary judgment is denied because Bouley might have created the dangerous condition.

**New York Nautical's Motion (Mot Seq 23)**

New York Nautical moves for summary judgment on the grounds that it did not create the condition or have constructive notice of the condition that caused plaintiff's accident. New York Nautical operated a store selling navigational charts and publications located next door to

Brushstroke's restaurant– they did not use grease or oil as part of their business. New York Nautical's business hours during July 2013 (when plaintiff was injured) were Monday through Friday (9 a.m. to 5 p.m.) and Saturday (9 a.m. to 1 p.m.). The store was not open on Sundays– when plaintiff's accident occurred. New York Nautical's witness (James Smith) testified that he had seen one prior spill from garbage from the restaurant next door (Brushstroke) three years prior to plaintiff's accident– Smith says he told restaurant employees about the problem and they took care of it. Smith insists that he did not notice a greasy, oily condition on the sidewalk when he closed the store around 1 p.m. on Saturday, July 27, 2013.

Only defendant One Hudson Park, Inc. "OHPI" opposes, but only if the Court were to deny OHPI's motion for summary judgment. While the instant motion was pending, the Court granted OHPI's motion and dismissed all claims against OHPI (NYSCEF Doc. No. 668). In any event, there is no basis to hold New York Nautical liable for the dangerous condition and its motion for summary judgment is granted.

**Brushstroke's Motion (Mot Seq 26)**

Brushstroke moves for summary judgment on the grounds that it did not create the dangerous condition and that it cannot be held liable for grease that appeared in front of New York Nautical. Brushstroke also claims that it did not use or create the type of grease which caused plaintiff to slip and fall. Brushstroke asserts that no witness testified that the substance which led to plaintiff's injuries came from Brushstroke and maintains that Brushstroke's chef (Yamada) testified that Brushstroke only used corn or grapeseed oil rather than the "Crisco" substance described by plaintiff at her deposition. Brushstroke also relies on the deposition of

Barthelmy, who insisted that he did not see any leaks when making the garbage pickup in front of Brushstroke the night before the accident.

In opposition, plaintiff relies on photographic evidence and the Tucker affidavit.

The Court finds that there are issues of fact based on the Tucker affidavit. Tucker claims he saw liquid leaking from bags put out in front of Brushstroke and that he saw his helper (Barthelmy) slip on the oil as the bags were loaded into the truck (Tucker aff, ¶¶ 10-15). The fact that plaintiff may have referred to a different type of oil is immaterial– there is no analysis of the oil that was found on the sidewalk. Further, the Court will not grant summary judgment simply because a person identified a name brand oil (Crisco) instead of the specific oils used by the restaurant. As stated above, a jury must decide whether they believe Tucker, Barthelmy, or neither of these witnesses.

Accordingly, it is hereby

ORDERED that the motions by Action, Bouley and Brushstroke (Motion Sequence Numbers 16, 22 and 26) for summary judgment are denied; and it is further

ORDERED that the motion by New York Nautical for summary judgment dismissing all claims and cross-claims against it is granted and the clerk is directed to enter judgment accordingly.

This is the Decision and Order of the Court.

**Dated: September 14, 2017**
**New York, New York**

**ARLENE P. BLUTH, JSC**

**ARLENE P. BLUTH**
**J.S.C.**