SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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ELIZABETH STORELLI,

Plaintiff,

-against-

McCONNER STREET HOLDINGS, LLC,

Defendant.

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DECISION/ORDER

Index no. 158809/2016

Mot. Seq. No. 006

HON. CAROL R. EDMEAD, J.S.C.:

Defendant McConner Street Holdings, LLC (McConner, or Defendant) move, pursuant to CPLR 3212, for summary judgment dismissing the Complaint.

BACKGROUND

Defendant owns McDonald's restaurant located at Broadway and 71st Street in Manhattan. On July 24, 2015, plaintiff Elizabeth Storelli (Storelli, or Plaintiff) ordered food at the subject McDonald's. While she was waiting for her food near the counter, Plaintiff alleges that "a female teenager customer intentionally bumped into me and cursed at me, calling me a 'white bitch'" (Plaintiff's aff, ¶ 5, NYSCEF doc No. 108). Plaintiff describes the situation escalating from there without any intervention by McDonald's employees:

> "This was in view of the four cashiers behind the counter and a manager in the dining area. After the female teenager called me a 'white bitch' I was shocked and did not know what to say. After the female teenagers bumped into me and cursed at me I moved away from the teenager and continued to wait for my food near the cash registers .... a few minutes later a male teenager came from behind me and poured a soda onto my head. When the male teenager poured the soda onto my head I was standing near the cash registers where there were at least four cashiers working who were in view of the incident. There was also a manager present in the dining area who was in view of the incident. I believe that I even made eye contact with the manager. None of the employees or mangers came to assist me or alert the police"

(*id.*, ¶¶ 9-11).

After the soda was allegedly poured on Plaintiff's head and McDonald's employees allegedly failed to intervene or call the police, Plaintiff states that the she was in "complete shock" (*id.*, ¶ 12). After seven to ten minutes, Plaintiff alleges that a group of teenagers advanced on her as she "stood by the cash registers with soda dripping down my head" (*id.*, ¶ 13, 20). Feeling that she was "in danger," Plaintiff "screamed and yelled for the manager or employees to help" (*id.*). Once again, Plaintiff alleges that "no McDonald's employee or manager came to assist me or call the police" (*id.*, ¶ 14). In fear, Plaintiff alleges that she tried to leave the McDonald's:

> "As I proceeded to leave the McDonald's some of the teenagers who were present in the McDonald's started to grab me and one teenager called me a 'fucking white bitch.' While this was occurring no McDonald's employee or manager came to assist me or do anything to alert the police. When I finally reached the outside of the McDonald's I was knocked to the ground by a group of at least ten teenagers … I was hit and kicked dozens of times. I fell onto my right side and went into the fetal position with my hands over my head. I was trying to protect my head. The attack on the sidewalk directly in front of McDonald's seemed never ending, it lasted for about five minutes. A man walking down the street alerted the police … I remember there being several police cars and [the passerby] holding me in his arms. The top of my head was bleeding"

(*id.* at 15-19).

Plaintiff filed the Complaint on October 19, 2016. The complaint alleges one cause of action: negligence against McConner. In this present motion, Defendant argues that it was not negligent, as it did not owe Plaintiff a duty to control other patrons on its premises. Plaintiff, in opposition, argues that Defendant had a duty to take reasonable measures to protect her safety and failed to do so.

DISCUSSION

"Summary judgment must be granted if the proponent makes '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,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

To establish negligence, a plaintiff is required to prove: "the existence of a duty, that is, a standard of reasonable conduct in relation to the risk of reasonably foreseeable harm; a breach of that duty and that such breach was a substantial cause of the resulting injury" (*Baptiste v New York City Tr. Auth.*, 28 AD3d 385, 386 [1st Dept 2006] citing, *inter alia, Palsgraf v Long Is. R.R. Co.*, 248 NY 339 [1928] [other citation omitted]). As to landowners' duty to those who come on their property, while landowners are not "insurers," they do have a duty to "take protective action" where they know "that there is a likelihood of conduct on the part of third persons … which is likely to endanger the safety of the visitor" (*Nallan v Helmsly-Spear, Inc.*, 50 NY2d 507, 519 [50 NY2d 507 [1980] [internal quotation marks and citation omitted]). In other words, "foreseeability," as has often been noted, "is essential element of negligence" (*id.* at 518).

Defendant argues that Plaintiff cannot establish the element of duty, as the subject incident was sudden and not preventable. In short, Defendant argues that the attack on Plaintiff was unforeseeable. In support, Defendant cites, among others, to *Gross v Empire State Bldg. Assoc.*, which involved a landlord's duty to tenants and their visitors (4 AD3d 45, 46 [1st Dept 2004]). The Court held that a landlord "cannot be held to a duty to take protective measures

unless it is shown that they know or … have reason to know that there is a likelihood of conduct, criminal or otherwise, likely to endanger the safety of those using their premises."

Plaintiff is correct that, once soda was poured on her head, Defendants had a duty to take protective action. Pouring soda on someone's head is, in itself, a criminal act and Plaintiff has submitted uncontested evidence that Defendant's employees knew that it happened. Plaintiff notes that Defendant's own manager, Emmanuel Joseph (Joseph), testified that employees are trained, when "situations" arise, to either call the police, or "if it's not anything too serious, if they're just talking, you just tell them to stop, and they understand and they stop" (Joseph tr at 36, NYSCEF doc No. 109). In this case, the uncontested testimony is that Defendant's employees neither intervened nor called the police.

As Plaintiff alleges that there was seven to ten minutes between the soda being poured on her head and the subsequent stages of the attack against her, there is a question of fact as to whether Defendant's failure to take protective action was proximate cause of Plaintiff's injuries. Thus, as Defendant had a duty to take protective action once they knew that soda was poured on Plaintiff's head, and as there is a question of fact as to whether the failure to do so was a proximate cause of Plaintiff's injuries, Defendant's motion must be denied.

In coming to this decision, the court does not rely on the expert affidavit of Michael Hodge (Hodge). Hodge, a security expert, concluded, among other things, that Defendants failed to take reasonable security measures in response to the ongoing assault verbal and physical assault of Plaintiff (NYSCEF doc No. 110 at 4). Defendant argues, in its reply papers, that the court should not consider Hodge's opinion, as Plaintiff did not exchange it prior to her opposition to summary judgment. However, this argument is not persuasive, as Defendant submits no evidence showing that it requested, or that the court ordered, Plaintiff to exchange

expert disclosure.[11] Thus, Hodge's opinion is just further evidence that Defendant is not entitled to summary judgment.

CONCLUSION

Accordingly, it is hereby

ORDERED that Defendant's motion for summary judgment is denied. It is further

ORDERED that Defendant shall serve a copy of this order with notice of entry upon all parties within ten (10) days of entry.

Dated: December 5, 2018

Hon. Carol Robinson Edmead, J.S.C.
HON. CAROL R. EDMEAD
J.S.C.

[11] The preliminary conference order, for example, makes no reference to expert disclosure (NYSCEF doc No. 16).