

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X	GT-9127
RACHEL MOLTNER,	:
	:
Plaintiff,	:
	:
against -	:
	:
STARBUCKS COFFEE COMPANY a/k/a	:
STARBUCKS CORPORATION,	:
	:
Defendant.	:
-----X	

**LOCAL RULE 56.1
STATEMENT**

Defendant STARBUCKS CORPORATION d/b/a STARBUCKS COFFEE COMPANY (hereinafter "Starbucks"), by and through its attorneys, Wilson Elser Moskowitz Edelman & Dicker, LLP, submits the following Statement of Undisputed Facts pursuant to Local Rule 56.1 of the United States District Court for the Southern District of New York in support of its Motion for Summary Judgment.

I

THE PARTIES

1. Plaintiff, Rachel Moltner, is a citizen and resident of the State of New York and resides at 333 East 46th Street, Apartment 9J, New York, New York. Deposition Transcript of Rachel Moltner dated December 10, 2008 at 3 (hereinafter cited "Pl. Dep. Tr. ___") attached to the Declaration of George N. Tompkins, III dated March 13, 2009 as Exhibit "C", submitted herewith (hereinafter cited "Tompkins Decl.").

2. Starbucks is incorporated under the laws of the State of Washington and maintains its principal place of business in Seattle, Washington. Starbucks Verified Answer to the Verified Complaint, ¶2; Tompkins Decl., Exhibit "B".

3. On February 19, 2008 and through the present time, Starbucks operated and continues to operate a retail store located at 1515 York Avenue, New York, New York (the "Starbucks Store"). Starbucks Answer to the Verified Complaint ¶2; Tompkins Decl., Exhibit "B".

II

PLAINTIFF'S ALLEGED ACCIDENT

4. On February 19, 2008, Plaintiff went to the Starbucks Store. Pl. Dep. Tr. 8; Tompkins Decl., Exhibit "C".

5. Plaintiff went to this same Starbucks Store every Tuesday for more than six months. Pl. Dep. Tr. 11, 12; Tompkins Decl., Exhibit "C".

6. Upon her arrival at the Starbucks Store, Plaintiff put her things down by one of the small tables. Pl. Dep. Tr. 13, 14, 15; Tompkins Decl., Exhibit "C".

7. Plaintiff, after leaving her things at the table, went to the counter to purchase a hot tea beverage. Pl. Dep. Tr. 15, 16; Tompkins Decl., Exhibit "C".

8. Plaintiff ordered a "regular" tea, but was offered a large size tea for the same price. Pl. Dep. Tr. 16; Tompkins Decl., Exhibit "C".

9. Starbucks beverages come in different sizes; Venti is the largest size. Deposition Transcript of Gunnar Sjursen dated December 15, 2008 at 46 (hereinafter "Sjursen Dep. Tr. ____"), attached to the Tompkins Decl., Exhibit "E".

10. Plaintiff received the tea from the Starbucks employee at the counter where she ordered the tea. Pl. Dep. Tr. 16, 17; Tompkins Decl., Exhibit "C".

11. The tea was double-cupped, had a lid on it and a cardboard sleeve. Pl. Dep. Tr. 18, 82, 83, 84; Tompkins Decl., Exhibit "C".

12. Plaintiff carried the tea back to her table, holding the cup with both hands on the sleeve. Pl. Dep. Tr. 18; Tompkins Decl., Exhibit "C".

13. Plaintiff was able to carry the double cupped sleeved tea beverage from the cashier to the table without any tea spilling. Pl. Dep. Tr. 19, Tompkins Decl., Exhibit "C".

14. The piece of string attached to the tea bag was dangling out. Pl. Dep. Tr. 19; Tompkins Decl., Exhibit "C".

15. Plaintiff, after setting her hot tea beverage down on the table, went to the condiment bar to get sugar, a stirrer and a napkin. Pl. Dep. Tr. 20, 21; Tompkins Decl., Exhibit "C".

16. Upon returning to the table with her condiments, Plaintiff attempted to remove the lid from the hot tea beverage. Pl. Dep. Tr. 22; Tompkins Decl., Exhibit "C".

17. To remove the lid, Plaintiff stood up "because the lids usually were on so tight that I found I needed the leverage. I stood up and tried to work around to get the lid off. I always had trouble with those lids." Pl. Dep. Tr. 22; Tompkins Decl., Exhibit "C".

18. Plaintiff, continuing to have difficulty removing the lid, moved the cup towards the middle of the table and "leaned way over" to try and remove the lid. "I don't know why I didn't go bring it back to..." Pl. Dep. Tr. 29, 30; Tompkins Decl., Exhibit "C".

19. Plaintiff described the accident as occurring "all of a sudden as I was working around to try and pull the lid off there was a terrible, like a whoosh, and it just exploded on me."

Plaintiff tried to jump back, but the tea hit her leg and went through her sneaker. Pl. Dep. Tr. 30; Tompkins Decl., Exhibit "C".

20. Plaintiff used her left hand to try and remove the lid. Pl. Dep. Tr. 31; Tompkins Decl., Exhibit "C".

21. Plaintiff placed her left hand over the lid and used her fingers to remove the lid. Pl. Dep. Tr. 32, 33; Tompkins Decl., Exhibit "C".

22. Plaintiff's right hand was on the sleeve. Pl. Dep. Tr. 33; Tompkins Decl., Exhibit "C".

23. Plaintiff, when she moved the tea to the middle of the table, picked it up with her right hand on the sleeve and her left hand on the lid. Pl. Dep. Tr. 36; Tompkins Decl., Exhibit "C".

24. When the "whoosh" occurred, the lid came off. Pl. Dep. Tr. 37; Tompkins Decl., Exhibit "C".

25. When the "cup exploded", Plaintiff moved back and took her hands off the cup. Pl. Dep. Tr. 39; Tompkins Decl., Exhibit "C".

26. The tea, when the whoosh occurred, did not come into contact with either of Plaintiff's hands. Pl. Dep. Tr. 42; Tompkins Decl., Exhibit "C".

27. Plaintiff never asked any of the employees at the Starbucks Store for any assistance, acknowledging that she should have because she always had a hard time removing the lids. Pl. Dep. Tr. 58, 59; Tompkins Decl., Exhibit "C".

28. Plaintiff did not notice anything wrong with the lid or cup before she had her accident. Pl. Dep. Tr. 59; Tompkins Decl., Exhibit "C".

29. Plaintiff intended to and did order a hot tea on the day of the accident. Pl. Dep. Tr. 76; Tompkins Decl., Exhibit "C".

30. Plaintiff was served a Venti size tea in a double cup with a sleeve. Pl. Depo. Tr. 82, 83, 84; Tompkins Decl., Exhibit "C".

31. Plaintiff does not know what the temperature of the tea was that she spilled at the Starbucks Store. Pl. Dep. Tr. 76; Tompkins Decl., Exhibit "C".

32. When Plaintiff makes tea at home, she brings the water to a boil in a tea kettle. Pl. Dep. Tr. 26, 27; Tompkins Decl., Exhibit "C".

33. Plaintiff filed out an incident report form while at the subject store before she left for the hospital. Pl. Dep. Tr. 61; Tompkins Decl., Exhibit "C"; Incident Report Form; Tompkins Decl., Exhibit "O".

34. Plaintiff is left handed. Pl. Dep. Tr. 31, 40; Tompkins Decl., Exhibit "C".

35. Plaintiff had treated with Dr. Harry Spiera, a rheumatologist, since 1975. Deposition of Harry Spiera, M.D. dated January 20, 2009 at 8; Tompkins Decl., Exhibit "I" (hereinafter "Spiera Tr. "___").

36. Plaintiff suffered from a particular type of arthritis called Palindromic Rheumatism. People with this type of arthritis experience episodic painful swelling of one or more joints. Spiera Tr. 9; Tompkins Decl., Exhibit "I".

37. When Plaintiff first sought treatment from Dr. Spiera, the joints affected included Plaintiff's left hand, right hand and the right leg. Spiera Tr. 9; Tompkins Decl., Exhibit "I".

38. On February 14, 2008, Plaintiff sought treatment from Dr. Spiera because her arthritis was "flaring up mainly in her shoulders and fingers." Spiera Tr. 27, 28; Tompkins Decl., Exhibit "I".

39. On February 15, 2008, Plaintiff sought treatment from Mount Sinai Sports Therapy Center. *See* the medical records from Mount Sinai Sports Therapy Center and Federal Rule 902 Certification; Tompkins Decl., Exhibit "J" (hereinafter "Therapy Center").

40. According to the handwritten note in the medical records, Plaintiff appeared at the Therapy Center on February 15, 2008 complaining that she cannot use her left hand, fingers and shoulder, and that her right finger was swollen and bent over. Tompkins Decl., Exhibit "J".

41. The cup and sleeve identified by Plaintiff as similar to the ones she was served stated "Careful, the beverage you are about to enjoy is extremely hot." Pl. Dep. Tr. 79, 80; Tompkins Decl., Exhibit "C".

42. Although Plaintiff testified that she did not see the language on the cup or sleeve, she knew from her experience that tea is hot, that it can burn and that she did not need to be warned. Pl. Dep. Tr. 80; Tompkins Decl., Exhibit "C".

43. It was a practice at the subject store for the employees to double cup all hot tea beverages. Chang Dep. Tr. 38, 39, 40; Tompkins Decl., Exhibit "D"; Sjursen Tr. 24, 25, 26, 27; Tompkins Decl., Exhibit "E".

44. On February 19, 2008, the Starbucks Store dispensed water for tea from a coffee brewing machine known as the Bunn Digital Brewer. Chang Tr. 31, 32; Tompkins Decl., Exhibit "D". Deposition of Walter Manzick dated January 12, 2009 at 16, 17; Tompkins Decl., Exhibit "F" (hereinafter "Manzick Tr. ___").

45. The Bunn Digital Brewer heats the water in the holding tank to 200 degrees. Manzick Tr. 18; Tompkins Decl., Exhibit "F".

46. The temperature of the water in the Bunn Digital Brewer is adjusted internally and cannot be adjusted by the store personnel. Chang Tr. 31; Tompkins Decl., Exhibit "D".

47. There were no problems with the temperature of the water dispensed by the Bunn Digital Brewer at the Starbucks Store. Chang Tr. 106; Tompkins Decl., Exhibit "D"; Manzick Tr. 31, Tompkins Decl., Exhibit "F".

48. Hester Chang became the Store Manager for this Store in May 2005. Chang Tr. 13; Tompkins Decl., Exhibit "D".


49. Between May 2005 and February 19, 2008, the Starbucks Store manager was not aware of any complaints that the water for coffee or tea was too hot. Chang Tr. 34; Tompkins Decl., Exhibit "D".

50. Between May 2005 and February 19, 2008, no one was injured by hot liquid at the Starbucks Store. Chang Tr. 111, 112; Tompkins Decl., Exhibit "D".

Dated: New York, New York
March 13, 2009

Yours, etc.,

WILSON ELSER MOSKOWITZ
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Local Rule 56.1 Statement was served By Hand this 13th day of March 2009 upon:

David Jaroslawicz, Esq.
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and via ECF filing this 13th day of March 2009 upon:

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George N. Tompkins, III