

Kosinska v Hoodz Kitchen Exhaust Cleaning

2019 NY Slip Op 30432(U)

February 15, 2019

Supreme Court, New York County

Docket Number: 150312/2013

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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GRAZYNA KOSINSKA,

Index No. 150312/2013

Plaintiff

- against -

DECISION AND ORDER

HOODZ KITCHEN EXHAUST CLEANING a/k/a
HOODZ OF HELL'S KITCHEN, TONIC BAR AND
RESTAURANT a/k/a TONIC BAR, a/k/a
TONIC, a/k/a TONIC TIMES SQUARE, 727
7TH AVE ASSOCIATES LLC, and JOHN DOE,

Defendants

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APPEARANCES:

For Plaintiff

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For Defendant Hoodz Kitchen Exhaust Cleaning

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LUCY BILLINGS, J.S.C.:

I. UNDISPUTED FACTS

Plaintiff suffered personal injuries on the morning of September 10, 2012, when she tripped on industrial hoses running across the sidewalk abutting defendant Tonic Bar and Restaurant at 727 7th Avenue, New York County. Tonic Bar and Restaurant had hired defendant Hoodz Kitchen Exhaust Cleaning to clean the restaurant's kitchen exhaust fans on the morning of September 10, 2012. Hoodz Kitchen Exhaust Cleaning's employees parked a truck equipped with water pumps outside the premises and ran hoses from

the truck across the sidewalk to the interior of the premises. Plaintiff, who was walking with her husband Waldenar Kosinski, attempted to traverse the sidewalk by placing her right foot between the hoses, but, as she attempted to step ahead with her left foot, she felt one or more hoses pulling on her right foot, lost her balance, and fell to the ground.

II. PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff now moves for summary judgment on her claim that defendant Hoodz Kitchen Exhaust Cleaning was negligent in performing its work unsafely and creating an unsafe condition on the sidewalk. C.P.L.R. § 3212(b) and (e).

A. Applicable Standards

To obtain summary judgment, plaintiff must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all material issues of fact. C.P.L.R. § 3212(b); Friends of Thayer Lake LLC v. Brown, 27 N.Y.3d 1039, 1043 (2016); Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP, 26 N.Y.3d 40, 49 (2015); Voss v. Netherlands Ins. Co., 22 N.Y.3d 728, 734 (2014); Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012). If plaintiff satisfies this standard, the burden shifts to Hoodz Kitchen Exhaust Cleaning to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues. De Lourdes Torres v. Jones, 26 N.Y.3d 742, 763 (2016); Nomura Asset Capital Corp. v. Cadwalader Wickersham & Taft LLP, 26 N.Y.3d at 49; Morales v. D & A Food

Serv., 10 N.Y.3d 911, 913 (2008); Hyman v. Queens County Bancorp, Inc., 3 N.Y.3d 743, 744 (2004). In evaluating the evidence for purposes of plaintiff's motion, the court construes the evidence in the light most favorable to Hoodz Kitchen Exhaust Cleaning. De Lourdes Torres v. Jones, 26 N.Y.3d at 763; Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 37 (2004).

To establish Hoodz Kitchen Exhaust Cleaning's liability for plaintiff's injuries, plaintiff must demonstrate that Hoodz Kitchen Exhaust Cleaning owed her a duty of reasonable care, breached that duty, and through its breach proximately caused her injury. E.g., Solomon by Solomon v. City of New York, 66 N.Y.2d 1026, 1027 (1985); Elmaliach v. Bank of China Ltd., 110 A.D.3d 192, 199 (1st Dep't 2013). Although Hoodz Kitchen Exhaust Cleaning was carrying out a contractual duty in performing work for Tonic Bar and Restaurant, the contractor was required to exercise reasonable care in performing those duties so as not to endanger anyone and may be liable for plaintiff's injuries if the contractor "launche[d] a force or instrument of harm." Espinal v. Melville Snow Contrs., 98 N.Y.2d 136, 140 (2002); Farrugia v. 1440 Broadway Assoc., 163 A.D.3d 452, 455 (1st Dep't 2018); Brown v. Garda CL Atl., Inc., 150 A.D.3d 542, 543 (1st Dep't 2017). Whether any dangerous condition that Hoodz Kitchen Exhaust Cleaning created was open and obvious is irrelevant to its duty to keep its work area reasonably safe for passersby. Farrugia v. 1440 Broadway Assoc., 163 A.D.3d at 454; Derix v. Port Auth. of

N.Y. & N.J., 162 A.D.3d 522, 522 (1st Dep't 2018); Polini v. Schindler El. Corp., 146 A.D.3d 536, 536 (1st Dep't 2017); Johnson-Glover v. Fu Jun Hao Inc., 138 A.D.3d 499, 500 (1st Dep't 2016).

B. Plaintiff Meets Her Burden.

Plaintiff presents Hoodz Kitchen Exhaust Cleaning's work order, authenticated by its witness' deposition testimony, showing that its employees performed kitchen exhaust cleaning services at defendant Tonic Bar and Restaurant on the morning of September 10, 2012, from 5:00 to 8:30 a.m. Aff. of Daniel B. Faizakoff Ex. E, at 44-45, 53-54, Ex. F. When performing these services, Hoodz Kitchen Exhaust Cleaning owed a duty not to create an unsafe condition. Espinal v. Melville Snow Contrs., 98 N.Y.2d at 140; Farrugia v. 1440 Broadway Assoc., 163 A.D.3d at 455; Brown v. Garda CL Atl., Inc., 150 A.D.3d at 542-43; Cornell v. 360 W. 51st St. Realty, LLC, 51 A.D.3d 469, 470 (1st Dep't 2008).

Plaintiff testified at her deposition that she observed a truck parked outside Tonic Bar and Restaurant and hoses running across the sidewalk in front of the restaurant at approximately 7:45 a.m. September 10, 2012. Faizakoff Aff. Ex. C, at 11, 51, 60-61. Plaintiff's husband also testified at his deposition that he observed these hoses running across the sidewalk and that they ran from the truck into the restaurant. Faizakoff Aff. Ex. D, at 27, 30, 35-36. The deposition testimony by Hoodz Kitchen Exhaust Cleaning's owner in September 2012, Russell Efron, corroborates

both plaintiff's and her husband's account. Efron admitted that Hoodz Kitchen Exhaust Cleaning employees used water hoses connected to a pump in their employer's truck to perform their cleaning and always ran the hoses from the truck across the sidewalk into the premises to be cleaned. Faizakoff Aff. Ex. E, at 17, 33. This testimony establishes that Hoodz Kitchen Exhaust Cleaning launched an instrument of harm by running hoses across the sidewalk into Tonic Bar and Restaurant, thus performing work unsafely and creating an unsafe condition on the sidewalk.

As set forth above, plaintiff testified that she attempted to traverse the sidewalk by stepping between the hoses with her right foot, but, as she attempted take her next step with her left foot, a pulling sensation on her right foot caused her to fall. Faizakoff Aff. Ex. C, at 60-61, 67-68, 98. Plaintiff further testified that, after she fell, her right foot remained tangled in the hoses. Id. at 99. Plaintiff thus establishes that Hoodz Kitchen Exhaust Cleaning's failure to perform its kitchen cleaning service for Tonic Bar and Restaurant in a reasonably safe manner and to keep the sidewalk in a reasonably safe condition caused plaintiff to fall and suffer injury. Derix v. Port Auth. of N.Y. & N.J., 162 A.D.3d at 522. See Farrugia v. 1440 Broadway Assoc., 163 A.D.3d at 455; Brown v. Garda CL Atl., Inc., 150 A.D.3d at 542-43; Sweeney v. Riverbay Corp., 76 A.D.3d 847, 847 (1st Dep't 2010); Grant v. Caprice Mgt. Corp., 43 A.D.3d 708, 709 (1st Dep't 2007).

C. Hoodz Kitchen Exhaust Cleaning's Rebuttal

Hoodz Kitchen Exhaust Cleaning does not dispute its control over the hoses running across the sidewalk where plaintiff fell or her account of her fall. Instead Hoodz Kitchen Exhaust Cleaning maintains that plaintiff failed to present any evidence that the hoses moved, causing her to fall. Plaintiff testified, however, that, as she planted her right foot between the hoses and attempted to step with her left foot, she felt the hoses pulling on her right ankle, which caused her to fall. *Faizakoff Aff. Ex. C*, at 67-68, 98. Hoodz Kitchen Exhaust Cleaning presents no evidence contradicting plaintiff's testimony. Moreover, even if Hoodz Kitchen Exhaust Cleaning's employees did not move the hoses, or even if the hoses did not move at all, without any warning, marking, or barrier, they still posed a tripping hazard across the sidewalk. *Sweeney v. Riverbay Corp.*, 76 A.D.3d at 847.

Hoodz Kitchen Exhaust Cleaning also maintains that it is not liable for any dangerous condition because the hoses were readily apparent, so that any danger they created was open and obvious. The fact that a danger may be open and obvious does not negate Hoodz Kitchen Exhaust Cleaning's duty to perform its work reasonably safely and is relevant only to plaintiff's comparative fault. *Farrugia v. 1440 Broadway Assoc.*, 163 A.D.3d at 455; *Derix v. Port Auth. of N.Y. & N.J.*, 162 A.D.3d at 522; *Socorro v. New York Presbyt. Weill Cornell Med. Ctr.*, 160 A.D.3d 544, 545 (1st Dep't 2018); *Johnson-Glover v. Fu Jun Hao Inc.*, 138 A.D.3d

at 500. Plaintiff need not establish that she was free from comparative fault to obtain summary judgment on defendant Hoodz Kitchen Exhaust Cleaning's liability. Rodriguez v. City of New York, 31 N.Y.3d 312, 325 (2018); Derix v. Port Auth. of N.Y. & N.J., 162 A.D.3d at 522.

III. CONCLUSION

Consequently, for all the reasons explained above, the court grants plaintiff's motion for summary judgment on her claim that defendant Hoodz Kitchen Exhaust Cleaning was negligent in performing its work unsafely, creating an unsafe condition on the sidewalk where she was walking, and causing her injury. C.P.L.R. § 3212(b) and (e). This decision constitutes the court's order and judgment on defendant Hoodz Kitchen Exhaust Cleaning's liability to plaintiff.

DATED: February 15, 2019



LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.