Service v Mangaroni. LLC
2019 NY Slip Op 32054(U)
July 3, 2019
Supreme Court, New York County
Docket Number: 156031/2015
Judge: Nancy M. Bannon

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON **PART** IAS MOTION 42EFM

Justice

----------X

SHANTE SERVICE,

Plaintiff,

- v -

MANGARONI, LLC D/B/A II BASTARDO, CLUB VIZCAYA NYC D/B/A VIZCAYA LOUNGE

Defendant.

----------X

INDEX NO. 156031/2015

MOTION DATE 12/20/2018

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 53

were read on this motion to/for JUDGMENT - SUMMARY.

In this personal injury action, the plaintiff alleges that while attending a New Years' Eve party at the defendant restaurant in Manhattan, a shelf above a bench on which she was sitting suddenly collapsed and struck her head. The complaint alleges causes of action for negligence and res ipsa loquitor. The plaintiff now moves for summary judgment on the complaint pursuant to CPLR 3212. The defendants oppose the motion. The motion is denied.

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824, 833 (2014); Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Zuckerman v City of New York, 49 NY2d 557, 562 (1980).. Once the movant meets this burden, it becomes incumbent upon the party opposing the motion to come forward with proof in admissible form to raise a triable issue of fact. See Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra.

However, if the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (see Alvarez v. Prospect Hospital, supra; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the

opposing papers. See Winegrad v New York University Medical Center, supra; O'Halloran v City of New York, supra; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013). This is because "'summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.'" Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

Both parties rely upon deposition testimony. According to the plaintiff, on December 31, 2014, she and a few friends arrived at the restaurant Il Bastardo about 11:00 p.m., danced to music played by a DJ and took photos. She consumed a flute of champagne at midnight, but no other drinks before or after. About 30-45 minutes after midnight, while seated with friends on a banquette or bench which was attached to the wall in a back room, an overhead shelf and items from the shelf hit her head. She testified that she briefly lost consciousness. The plaintiff denied that she or anyone else was standing or dancing on the bench, and testified that she had not observed the shelf prior to sitting down under it.

Sherif Ibriham had worked as the general manager of the restaurant since 2010 and was present at the time of the incident. He testified that defendant Mangaroni, LLC leased the premises from the non-party property owner and that named defendant Club Vizcaya NYC d/b/a Vizcaya Lounge had not been in the space since 2004 or 2005. He testified that the restaurant consisted of three separate rooms, two of which were in use for the New Year's Eve Party. The event was arranged by, and tickets sold by, a party promoter, which is not named as a party in this action. A DJ hired by the promoter was playing music, and the party went from 9:00 pm to 2:00 a.m. The room in which the incident occurred contained 12 tables and four banquettes, and had a maximum capacity of 60 persons. There were about 40 people in the room that night.

According to Ibriham, the subject shelf, one of several in the room, had been installed prior to the restaurant opening in 2004 or 2005, and was never removed or replaced. The shelves were not inspected but they were cleaned by staff almost every shift. Ibrahim was summoned to the back room by a friend of the plaintiff after the shelf fell, he saw her sitting on the bench with the shelf behind her and the decorative items that had been on the shelf, small vases and glass jars of pasta, were now on the floor. The plaintiff told Ibrihim that her head hurt asked him for water. The subject shelf was wooden and held up by metal brackets screwed in to the wall. After the shelf fell, the brackets remained in place, such that the shelf need only be

placed back onto the brackets after it fell. At that time, it had appeared to Ibrahim that someone had knocked the shelf off the brackets from beneath it. Ibrahim was not asked about any prior incidents.

The photographs of the room and walls provided by the defendant show the subject shelf to be approximately 2 to 3 feet long, made of wood and metal and mounted on the wall several feet above the bench where the plaintiff was sitting. The photographs provided by the plaintiff, apparently taken on a phone and of herself while still on the bench, are mostly unclear. In her testimony, the plaintiff identified two of her friends who were present and saw the accident happen, and Ibrahim testified that there were approximately 40 people present in the room. However, neither party submitted any testimony or affidavit from anyone else present in the restaurant at the time of the incident.

Even assuming that the plaintiff met her burden of proof in the first instance, the defendant raised triable issues of fact in regard to the claim of negligence, particularly in regard to whether the defendant created or had notice of any defective or dangerous condition on the premises and the whether the plaintiff's injuries were due in part to any voluntary action or contribution on the part of the plaintiff or another attendee at the party.

The principle of res ipsa loquitur is available to a plaintiff only if she can establish three elements (1) the injury-causing event must be of a kind that ordinarily does not occur in the absence of negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff. See Morejon v Rais Constr. Co., 7 NY3d 203, 210 (2006); Kambat v St. Francis Hosp., 89 NY2d 489 (1993); Dermatossian v New York City Tr. Auth., 67 NY2d 219, 226 (1986). In confirming that the doctrine of res ipsa loquitur is rarely applicable, the Court of Appeals in Morejon v Rais Constr. Co., supra., observed that "[o]ver the last century, the Appellate Division has held barely more than a dozen times that a plaintiff is entitled to summary judgment or a directed verdict in res ipsa loquitur cases." This is not one of those exceptional cases. The plaintiff has not established in her motion papers, by expert evidence or other proof, that her injuries were the type that ordinarily do not occur in the absence of negligence. See Dosanjh v Satori Laser Center Corp., 127 AD3d 531 (1st Dept. 2015); Ruggiero v Waldbaum's Supermarkets, Inc., 242 AD2d 268 (2nd Dept. 1997). Moreover, the proof submitted demonstrates that at the time of the accident, at a New Year's Eve party

where there were up to 40 people in the room, the defendant did not have exclusive control over the instrumentality of the injury, the shelf. See Mercatante v City of New York, 286 AD2d 265 (1st Dept. 1955) [res ipsa loquitur not applicable where plaintiff struck by fire extinguisher that fell from wall of public hallway in hospital]; see also Pinto v Little Fish Corp., 273 AD2d 63 (1st Dept. 2000) [plaintiff who slipped in liquid on floor of restaurant cannot establish exclusive control element of res ipsa loquitur]; compare Bonventre v Max, 229 AD2d 557 (2nd Dept. 1996) [plaintiff struck by falling mirrored wall while exiting defendant's store]. While the trial evidence may be greater, the plaintiff has not established, by proof in admissible form, her entitlement to judgment as a matter of law.

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment is denied.

This constitutes the Decision and Order of the court.

7/3/2019
DATE

NANCY M. BANNON, J.S.C.

HON. NANCY M. BANNON

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE