SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DEBRA A. JAMES** **PART** **IAS MOTION 59EFM**

Justice

----------X

AUDREY QUANTANO,

Plaintiff,

- v -

THE INSTITUTE OF CULINARY EDUCATION, INC. and CHRIS GESUALDI,

Defendants.

----------X

INDEX NO. 152880/2015

MOTION DATE 10/29/2018

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 74

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

ORDER

Upon the foregoing documents, it is

ORDERED, that the motion of defendants Institute of Culinary Education, Inc. and Chris Gesualdi for summary judgment dismissing the complaint is denied.

DECISION

Plaintiff Audrey Quantano commenced this action to recover damages for personal injuries she sustained on March 17, 2013 when hot stock spilled on her during a class taught by defendant Chris Gesualdi (Gesualdi) at defendant Institute of Culinary Education, Inc. (ICE) (together, defendants). Defendants now move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

Background

Plaintiff is a former culinary student at ICE. Prior to attending ICE, plaintiff had taken culinary classes at the French Culinary Institute (FCI) in the 1990s and had received a culinary certificate from New York Food and Hotel Management (NYFHM) in 1995. Plaintiff decided to attend ICE to learn new trends and reeducate herself prior to opening her own café. Gesualdi was one of her instructors.

At her deposition, plaintiff testified that she received training on how to handle hot objects in the kitchen in the programs at FCI and NYFHM. For example, she had been taught to use towels to alert others in the kitchen "that this was a hot object" and that she "would never be told to remove a hot pot from a stove". Plaintiff explained, "[y]ou wait until the product is cooled, before you remove the hot pot from the stove; that was the -- part of the training". She expressed that Gesauldi never discussed kitchen safety during her program at ICE.

On the day of the accident, plaintiff arrived at the classroom early to help prepare the students' stations before class began. Gesualdi directed the group to which she was assigned, which included "Alejandro" and another female student, to transfer the contents of a 10-gallon pot of hot rabbit stock on the stove into smaller containers. When the stock would not pass through a spigot on the side of the pot, plaintiff suggested "that we had to remove

the pot, down to the floor". Plaintiff testified that Gesualdi told them to complete the task manually by removing "the pot from off the stove, onto the floor". After Gesualdi gave them these instructions, he left the classroom. Plaintiff later denied devising the plan of sliding the filled pot off the stove.

Plaintiff admitted that she had handled similarly-sized pots in her other culinary jobs and at FCI and NYFHM. She told Alejandro, "we needed to sort of slide the pot from the stove, together, but that we had to use our side towel to lift the pot with handles". Plaintiff testified that she and Alejandro "were just slowly trying to work the pot off the stove" and that they were sliding the pot forward as she had "requested", when she saw Alejandro pick his side up. Plaintiff was holding her end when "Alejandro dropped the pot" and the stock spilled on her. Plaintiff sustained second and third degree burns to her right arm, right leg, torso and face.

Plaintiff testified that Gesualdi was not in the classroom to direct them on how to remove the stockpot from the stove. She also testified that the stock should have been left to cool in the pot for at least eight hours or more before being transferred per ICE's textbook. Although she had received prior training on how to deal with hot objects in a kitchen, plaintiff testified that she was aware the hot pot should not have been moved based on her prior experience. However, plaintiff maintained that despite her

prior culinary training, she was a "student . . . following all instructions, as a student; that's how I went in" to ICE. Plaintiff also testified that when she confronted Gesualdi about "classroom order" one week prior to the accident, Gesualdi responded by announcing to the class that "he was in charge, that, at some point, that if people didn't listen to -- The Institute would . . . get rid of those people starting trouble or any trouble".

At his deposition, Gesualdi testified that he had been employed as a full-time culinary instructor at ICE from 2005 to 2016 and is licensed by New York State to teach. Gesualdi testified that between July and October 2005, he sat through 100 classes taught by other instructors at ICE before he could begin teaching. ICE relied on food safety videos, printed handouts, and verbal instructions to teach students about kitchen safety. Gesualdi explained that dry towels were always used to move hot sheet trays, grab hot pot handles, or hold pots with hot liquid in them. Gesualdi also explained that students should not "try to do a job that's like too heavy" and that they should not "take any risks".

Gesualdi testified that plaintiff was one of 10 to 12 students in a meat fabrication class. Students were graded on their class participation. On the day of the accident, there was a 15- or 20-gallon pot of lamb stock that had been simmering overnight on a

stove. Gesualdi testified that hot stocks were strained through fine mesh strainers and, unless they were to be used right away, the strained stocks were cooled on ice "so they're not in the danger zone and nobody gets sick". On this occasion, Gesualdi directed Alejandro and "Mariuxsol," a female student, to strain the stock before class began. Plaintiff was not present when Gesualdi gave Alejandro and Mariuxsol these instructions. When he was told that the spigot on the stockpot was clogged, Gesualdi responded, "we would have to take it off the stove and put it on the floor" and use a ladle to transfer the stock into smaller containers. Gesualdi explained that taking the pot off the stove required two people, and that he had personally performed that task prior to the day of the accident. He told Alejandro and Mariuxsol that he and Alejandro would move the pot off the stove together. At that time, Gesualdi had been writing notes on an easel and standing three feet to four feet from the stove. He asked for 30 seconds to finish his notes before he could help move the stockpot. He maintained that he never let female students volunteer to help move that pot. Gesualdi testified that the lamb stock was the 18th stock made in that class, and that he had previously warned the students to take care when moving the stockpot off the stove. Gesualdi testified that he was still writing on the easel when he saw plaintiff at the stove. Mariuxsol had gone to retrieve a smaller pot, and Alejandro was holding onto

the pot with plaintiff next to him. Gesualdi explained that he was standing at the easel when he "heard the pot hit the floor" a minute later. He saw that plaintiff's clothing was wet after the accident.

The Parties' Contentions

Defendants argue that the primary assumption of risk doctrine bars plaintiff's claim as the testimony shows it was plaintiff who suggested moving the hot stockpot to the floor. Furthermore, defendants assert that cooling the stock before straining it was contrary to the directions in the textbook used at ICE, which states that hot stock should be strained for immediate use or cooled. Leaving the stock in the pot to cool also would have been dangerous under the guidelines issued by the United States Department of Agriculture.

Plaintiff opposes the motion, and argues that defendants were negligent in directing her to move the stockpot before the stock had cooled, in directing plaintiff to move a "pot that was too high and too heavy," and in allowing Gesualdi to leave the classroom unsupervised. She submits a report from her plastic surgeon, photographs of the classroom where the accident took place, ICE's incident report, and a two-page notarized, handwritten statement from Alejandro Mejia, one of the students tasked with straining the stock on the day of the accident. Alejandro stated Gesualdi "directed me and the women in my team"

to move a 15- or 20-gallon pot of boiling chicken stock from the stove to the floor. Alejandro stated that Gesualdi never helped move the stockpot on that day, or on any of the preceding days when stock was made, and that female students had moved the stockpot in prior classes. Alejandro indicated that Gesauldi left the classroom after he told them to move the pot. He stated that plaintiff "lost her grip because she could not handle the weight of the pot and the pot fell and the chicken stock spilled all over her".

Plaintiff also tenders an affidavit from expert Timothy McLean (McLean), a professional chef and culinary instructor. McLean opines that Gesualdi violated standards and practices in the industry by leaving the students unsupervised and unattended. In addition, McLean opines that it is the better practice to dip a smaller pot into the stockpot to strain the stock, rather than moving the stockpot to the ground, especially when the stove is higher than waist level. McLean further opines that the stock should have been left to cool on the stove until it reached 135 degrees.

Discussion

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v New York Univ.

Med. Ctr., 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (see CPLR 3212). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*id.*, citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). The "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, *regardless of the sufficiency of the opposing papers*" (Vega, 18 NY3d at 503 [internal quotation marks and citation omitted, emphasis in original]).

Under the primary assumption of risk doctrine, "one is deemed to have assumed, as a voluntary participant . . . certain risks occasioned by athletic or recreational activity, and to the extent of such an assumption, any legally enforceable duty to reduce the risks of such activity is limited" (Roberts v Boys & Girls Republic, Inc., 51 AD3d 246, 247 [1st Dept 2008], affd 10 NY3d 8879 [2008] [internal citations omitted]). "[I]n its most basic sense it 'means that the plaintiff, in advance, has given his . . . consent to relieve the defendant of an obligation of conduct

toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone'" (Turcotte v Fell, 68 NY2d 432, 438 [1986], quoting Prosser and Keeton, Torts § 68, at 480-481 [5th ed]). Thus, "a plaintiff who freely accepts a known risk 'commensurately negates any duty on the part of the defendant to safeguard him or her from the risk'" (Custodi v Town of Amherst, 20 NY3d 83, 87 [2012], quoting Trupia v Lake George Cent. School Dist., 14 NY3d 392, 395 [2010]). However, application of the doctrine "depend[s] upon whether, under the particular circumstances, the plaintiff may be said to have freely and knowingly consented to assume the risks of a qualifying activity" (Trupia, 14 NY3d at 396 n). Where a plaintiff received "'a direction by a superior to do the act' and 'an economic compulsion or other circumstance which equally impels' compliance with the direction," despite the obvious risks, the defense is assumption of the risk unavailable (see Benitez v New York City Bd. of Educ., 73 NY2d 650, 658 [1989] [internal quotation marks and citations omitted]).

The risk of sustaining injury from contact with a hot liquid that has recently been boiled is apparent (see Griffin v Starbucks Corp., 52 AD3d 250, 250 [1st Dept 2008] [awarding damages where the plaintiff was injured from hot coffee that had spilled on her left foot]). It is evident that plaintiff was fully aware of the risk of potential injury, given her prior training regarding how

to handle hot objects in a commercial kitchen and her prior experience maneuvering similarly-sized stockpots (see Maddox v City of New York, 66 NY2d 270, 278 [1985] [stating that a plaintiff's awareness of the risk must be "assessed against the background of the skill and experience of the particular plaintiff"]).

Ordinarily, the doctrine of primary assumption of risk applies to "particular athletic and recreative activities in recognition that such pursuits have 'enormous social value'" (Custodi, 20 NY3d at 88, quoting Trupia, 14 NY3d at 395]). In this instance, plaintiff was not engaged in such an activity, and neither defendants nor plaintiff have furnished the court with any legal authority where the doctrine has been applied to accidents that occur in culinary school. Where a plaintiff was not participating in an athletic or recreational activity, the primary assumption of the risk doctrine is generally inapplicable (see Riccio v Kid Fit, Inc., 126 AD3d 873, 873 [2d Dept 2015] [concluding that the doctrine did not apply where the plaintiff sustained burns from a lit sterno canister underneath a chafing tray she was carrying]). Nevertheless, the doctrine has been applied to bar recovery for injuries sustained during nonsporting and nonrecreational activities (*see Watson v State of New York*, 77 AD2d 871, 871 [2d Dept 1980], affd 52 NY2d 1022 [1981] [finding that the plaintiff assumed the risk of injury by assaulting his

instructor]; Szkatulski v Thruway Inn, Inc., 21 Misc 3d 1115[A], 2006 NY Slip Op 52641[U], *2-4 [Sup Ct, Erie County 2006], affd 41 AD3d 1195 [4th Dept 2007] [finding that the 21-year old plaintiff assumed the risk of injury when the 151 proof rum she lit in her mouth as part of a trick caused her hair to catch fire]).

One element necessary to invoke the primary assumption of risk doctrine is the plaintiff's voluntary consent (see Benitez, 73 NY2d at 658). As applied herein, defendants have presented two vastly different versions of the events immediately preceding the accident. Plaintiff testified that she was directed to move the stockpot to the floor by her superior, whereas Gesualdi testified that he informed plaintiff that he would move the stockpot with Alejandro's assistance. Plaintiff also testified initially that it was her suggestion to move the stockpot, then denied that it was her idea. Alejandro's notarized statement appears to support plaintiff's version of events. There is no evidence to suggest that options other than moving the stockpot were available to plaintiff as her group was tasked with transferring the hot stock into small containers (see Hanson v Sewanhaka Cent. High Sch. Dist., 155 AD3d 702, 704 [2d Dept 2017] [stating that the plaintiff "chose to play basketball from a number of options"]). Furthermore, the incident took place in a classroom setting (see Scavelli v Town of Carmel, 131 AD3d 688, 690 [2d Dept 2015] [stating that "the compulsory nature of . . . class activities

precludes an assumption of risk defense"]; accord Stoughtenger v Hannibal Cent. School Dist., 90 AD3d 1696, 1697 [4th Dept 2011]). Thus, a question of fact exists as to whether plaintiff's participation was entirely voluntary (see Salvieterra v Havekotte, 273 AD2d 218, 219 [2d Dept 2000] [finding it proper to charge a jury with assumption of risk and inherent compulsion where the plaintiff had been directed by her employers to clean an oven with defective gloves]), particularly when ICE students receive grades based on their participation. Moreover, plaintiff and Alejandro stated that Gesualdi was not present in the classroom when the accident occurred, but Gesauldi testified that he was less than four feet from plaintiff when the accident occurred. Such contrary testimony raises questions of credibility that cannot be resolved on a motion for summary judgment (see Encalada v McCarthy, Chachanover & Rosado, LLP, 160 AD3d 475, 476 [1st Dept 2018]). Therefore, based on this record, the court is constrained to deny the motion.

10/16/2019
DATE

DEBRA A. JAMES, J.S.C.

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