Comando v C.P. Yang Corp.
2019 NY Slip Op 33188(U)
October 24, 2019
Supreme Court, New York County
Docket Number: 153090/2016
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35
---x
THEODORE COMANDO,

Plaintiff,

-against-

C.P. YANG CORP.,

Defendant.
---x

DECISION AND ORDER
Index No.: 153090/2016
Motion Sequence 004

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

MEMORANDUM DECISION

In this negligence action, Defendant C.P. Yang Corp. moves, pursuant to CPLR 3212, for summary judgment dismissing the Complaint. For the reasons set forth below, the Court denies Defendant's motion.

BACKGROUND FACTS

On August 27, 2015, Plaintiff went to Defendant's grocery store deli on the Upper West Side to purchase a cup of coffee. Plaintiff walked to the counter and lifted a coffee pot from the coffee burner to pour himself a cup. While lifting the pot to pour it into a cup, the bottom of the pot fell out, causing Plaintiff's legs and feet to be scalded with second degree burns (NYSCEF doc No. 88, ¶ 7).

Defendant offers a countering version of the facts. The owner of the store, Keumyul Yang, stated in disposition that he was not present during the incident but was told by his employee, Domingo Ogacion, that two coffee pots were involved, and that Plaintiff was holding

the right coffee pot and hit the pot into the left coffee pot, causing a hole in the side of the coffee pot that Plaintiff was holding (NYSCEF doc No. 83 at 11-12, 44, 87-88). However, when Mr. Ogacion was deposed separately, he stated that Plaintiff was holding the left coffee pot and the bottom fell out (NYSCEF doc No. 84 at 40-42). Plaintiff and Defendant also dispute what time the incident happened, as Mr. Ogacion stated that Plaintiff's accident must have occurred before his shift ended at 7:00 a.m. (*id.* at 10-14). However, the ambulance call and emergency room records submitted by Plaintiff indicate the accident took place around 9:00 a.m.

No video footage of the incident exists, as Defendant recorded over the security footage of the day of the incident prior to Plaintiff submitting a request for the footage. This Court previously entered an Order granting an adverse inference to be used at trial pursuant to PJI 1:77, due to Defendant's failure to preserve the video evidence (NYSCEF doc No. 93).

Defendant now moves for summary judgment, arguing that it did not cause or create a hazardous condition, nor did it have actual or constructive notice of such condition. Defendant argues that there is no evidence the coffee pot was defective as it had no cracks or other visible defects, and that no prior complaints had been rendered regarding the coffee pot. Defendant further contends there was no duty to warn of the coffee pot since there was no sign it was inherently dangerous. Plaintiff opposes, noting that questions of fact regarding Defendant's notice remain as Defendant only provided testimony regarding general custom and procedures for the coffee pot, and that Defendant may be liable under the doctrine of *res ipsa loquitur*. Plaintiff contends that in any event, the differing accounts of the accident and Defendant's failure to preserve the video evidence render summary judgment improper.

DISCUSSION

Summary judgment is granted when "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]). Once the proponent has made a prima facie showing, the burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also, DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]). When the proponent 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).

The function of a court in reviewing a motion for summary judgment "is issue finding, not issue determination, and if any genuine issue of material fact is found to exist, summary judgment must be denied" (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, [1st Dept 2012]). Where "credibility determinations are required, summary judgment must be denied" (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, [1st Dept 2012]). Thus, on a motion for summary judgment, the court is not to determine which party presents the more credible argument, but whether there exists a factual issue, or if arguably there is a genuine issue of fact (*DeSario v SL

Green Management LLC, 105 AD3d 421 [1st Dept 2013] (holding given the conflicting deposition testimony as to what was said and to whom, issues of credibility should be resolved at trial).

The Court finds summary judgment to be an improper remedy for Defendant as nearly all the facts of this case are in question. Defendant and Plaintiff have offered drastically different accounts of how the accident happened. Plaintiff argues that this Court's prior granting of an adverse inference to be used at trial is sufficient to defeat the summary judgment motion in and of itself. This is not accurate; the grant of an adverse inference alone does not automatically defeat summary judgment, as it does not shift Plaintiff's burden of proof to demonstrate an essential elements of his case. (*See Baez v City of New York,* 278 AD2d 83, 83-84 [1st Dept 2000]). However, the fact that Defendant did not preserve video evidence of the accident means this case now turns on the credibility and evidence offered by the parties to support their differing versions of events. It is the role of the jury, not the judiciary, to assess the credibility of the arguments presented. Therefore, while the adverse inference alone does not render summary judgment inapplicable to Defendant, the lack of video footage or any external evidence beyond conflicting deposition testimony does mean that summary judgment cannot be rendered.

Defendant also has not met its burden regarding notice of an issue with the coffee pot. The burden is not on Plaintiff to show that defendant had notice, but rather on Defendant to prove that they never had any notice. A lack of prior complaints alone is not sufficient (*Weingrad v NYU*, 65 NY2d 852 [1985]). Therefore, the fact that no customers complained about the coffee pot before this incident is not dispositive. Defendant has not provided any documentation showing the coffee pot was cleaned or inspected prior to the accident, but instead only offered

testimony regarding general custom and procedures. A lack of specific evidence and personal knowledge regarding the alleged hazard means that Defendant has not established prima facie entitlement to summary judgment (*See Bonilla v 191 Realty Assocs., LP,* 125 AD3d 470 [1st Dept 2015], *Jackson v Whitson's Food Corp.*, 130 AD3d 461, 462 [1st Dept 2014]). Material questions of fact exist as to whether Defendants were negligent in their ownership, management and operation of their store, and the condition of the coffee pot (or pots) involved in the accident.

The Court writes separately to address Plaintiff's argument that the doctrine of *res ipsa loquitur* applies to his accident. Under the doctrine of *res ipsa* loquitur, the event must be of a kind that does not ordinarily occur in the absence of someone's negligence; (2) it must be caused by an instrumentality within the exclusive control of the defendant; and (3) the plaintiff must not have effected the happening of the event by any voluntary action. (*See Burgess v Otis Elevator Co.,* 114 A.D.2d 784 [1st Dep't 1985]). In *Morejon v Rais Constr. Co.*, the Court of Appeals stated that the doctrine applies when

> "a plaintiff to whom the defendant owes a duty of care [has been injured] but is not in a position to prove directly what actually happened or that a specific act of the defendant was negligent."
>
> (7 NY3d 203, 205 [2006]).

The Court finds that the doctrine is inapplicable at this juncture, as Defendant challenges the manner in which Plaintiff says the accident happened, and therefore it cannot be said with certainty that "the event (is of) a kind which ordinary does not occur in the absence of someone's negligence." (*See Dennatossian v New York City Transit Authority*, 67 NY2d 219, 226 [1986]). If the accident occurred in the way Defendant claims it did, *res ipsa loquitur* also would not apply as there was possibly voluntary contribution to the accident by Plaintiff. Furthermore,

there is a question of fact as to whether the coffee pot was under Defendant's exclusive control, as customers in Defendant's store had access to the pot and used it to pour themselves coffee (*see Hardesty v Slice of Harlem, II, LLC*, 79 A.D.3d 472 [1st Dept. 2010]). As there are several material questions of fact as to how this accident occurred, a question of fact also exists as to whether *res ipsa loquitur* is applicable.

As there are conflicting accounts from parties regarding the circumstances of the accident, the Court finds summary judgment premature at this stage in the proceedings, and Defendant's motion must be denied.

CONCLUSION

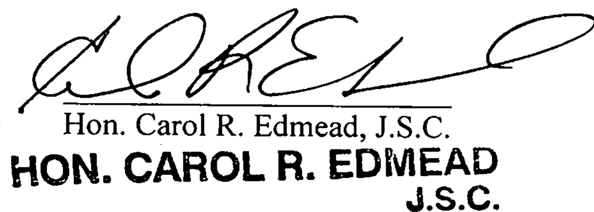
Based on the foregoing, it is hereby

ORDERED that Defendant C.P. Yang Corp.'s motion for summary judgment is denied in its entirety; and it is further

ORDERED that counsel for Plaintiff shall serve a copy of this decision, along with notice of entry, on all parties within 10 days of entry; and it is further

ORDERED that the parties are directed to appear in Part 40 for trial on December 2, 2019.

Dated: October 24, 2019



Hon. Carol R. Edmead, J.S.C.

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