SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE TRIAL/IAS PART 18

X

DYLEN MAGISTRO, Infant by CARA MAGISTRO, Mother and Natural Guardian, and CARA MAGISTRO, Individually,

Plaintiffs,

-against-

BUTTERED BAGEL, INC.,

Defendant.

Index No. 001668/08
Motion Sequence...03
Motion Date...01/19/11
XXX

X

Papers Submitted:
Notice of Motion.....x
Memorandum of Law.....x
Affirmation in Opposition.....x
Reply Affirmation.....x

Upon the foregoing papers, the Defendant's motion, pursuant to CPLR § 3212, seeking an order granting summary judgment dismissing the within complaint is determined as hereinafter provided.

On June 29, 2006, the Plaintiff, DYLEN MAGISTRO, who was 4 years old at the time, was injured at the Defendant's premises, a bagel store, located at 4917 Merrick Road, Massapequa Park, New York (*see* Fleischman Affidavit in Support sworn to on

October 4, 2010 at ¶ 2). On the morning thereof, the Plaintiff arrived at the bagel store with his mother, the Plaintiff, CARA MAGISTRO, who was purchasing breakfast. Ms. Magistro testified at her Examination Before Trial that while she was paying for the items purchased, her sons sat at a table approximately six (6) feet from her. The table in question was a raised table and the chairs were like bar stools. Ms. Magistro testified that she paid for the food and then told her sons to come as they were leaving the store. Also present was Ms. Magistro's then boyfriend, Steven Goldwaser.

Ms. Magistro testified that as her son went to slide down the stool, he put his right hand on the table and as he started to slip off the stool, the table tipped and fell. The table landed on Dylen's right hand partially severing his right pinky.

An employee of the Defendant at the time of the occurrence, Doris Cody, provided an affidavit sworn to on October 4, 2010 in support of the Defendant's motion. In her affidavit, Ms. Cody states that the Plaintiff, Dylen Magistro was left unattended and climbed onto the table causing it to fall. She stated in her affidavit that she observed Cara Magistro on line waiting to be served kissing a man and not paying attention to her son. She further stated in her affidavit that prior to the accident she never observed any defective condition of the tables or chairs in the store, nor had she received any oral or written complaints with regard to any defective condition of the tables and chairs. Lastly, Ms. Cody states in her affidavit that she was unaware of any instability or unsteady condition of any of the tables or chairs.

In moving for summary judgment, the central contention posited by counsel for the Defendant is that the record herein demonstrates that the Defendant neither created the alleged dangerous condition nor had actual or constructive notice thereof and the Plaintiff therefore could not prevail. In support of said contentions, counsel relies upon the annexed deposition testimony of the Plaintiff, the deposition testimony of the President of the Defendant corporation, Daniel Fleischman, and the affidavit of Doris Cody, an employee on duty the day of the occurrence, who states that she witnessed the occurrence.

In opposing the within application, counsel for the Plaintiff argues that the Affidavit of the Plaintiff's expert, Dr. Jeffrey Ketchman, P.E., sworn to on December 1, 2010, establishes that the table which fell was in a defective condition and was prone to tipping with the slightest pressure. Dr. Ketchman includes with his affidavit several pictures taken of the premises and tables and chairs as they existed on July 29, 2010, more than four (4) years after the occurrence. Additionally, Dr. Ketchman relies on a sign posted at the store which states "Please be careful on tall tables" to establish that the Defendant recognized the hazards associated with the tables.

Summary Judgment is a drastic remedy and should only be granted where there are no triable issues of fact. *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). A Defendant who moves for summary judgment in a premises liability case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover or remedy it (see

Joachim v. 1824 Church Ave. Inc., 12A.D.3d 409, 410 (2nd Dept. 2004); *Goldman v. Waldbaum, Inc.*, 228 A.D.2d 436 (2nd Dept. 1998). A Defendant who had actual knowledge of an ongoing and recurring dangerous condition can be charged with constructive notice of each specific reoccurrence of the condition. *Freund v. Ross-Rodney Hous. Corp.*, 292 A.D.2d 341, 342 (2nd Dept. 2002) quoting *Osorio v. Wendell Terrace Owners Corp.*, 276 A.D.2d540 (2nd Dept. 2000).

Whether or not the Defendant had actual or constructive notice and whether or not the Defendant created the dangerous condition is a question of fact to be decided by a trier of fact. The question presented by this motion is whether the Plaintiff has raised a triable issue of fact that the Defendant had notice of the condition and/or created it. Viewing the evidence herein in a light most favorable to the Plaintiff, the court finds that the Plaintiff has failed to raise the requisite issue of fact on this question.

As noted above, this action is sounded in negligence. It is well settled that to establish a *prima facie* case of negligence, it is incumbent upon the plaintiff to establish that the defendant either created the dangerous condition or had actual or constructive notice thereof (*Golding v. Powell & Dempsey, Inc.*, 247 A.D.2d 510 [2d Dept. 1998]; *Carrillo v. PM Realty Group,* 16 A.D.3d 611 [2d Dept. 2005]). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Golding v. Powell & Dempsey, Inc.,* 247 A.D.2d 510 [2d Dept. 1998], *supra* quoting *Gordon v. American*

Museum of Natural History, 67 N.Y.2d 836 [1986] at 837).

Having reviewed the record, the Court finds that the Defendant has established its entitlement to judgment as a matter of law. In the instant matter, the dangerous condition alleged to have caused the Plaintiff's accident was an allegedly defective table which had the tendency to tip because it was "wobbly". However, there has been no evidence adduced from the record that the Defendant created the alleged defective condition (*Golding v. Powell & Dempsey, Inc.*, 247 A.D.2d 510 [2d Dept. 1998], *supra*; *Carrillo v. PM Realty Group,* 16 A.D.3d 611 [2d Dept. 2005], *supra)*. Rather, the relevant deposition testimony and affidavits reveal that the only question of fact is whether the infant Plaintiff climbed onto the table or pulled on the table as he was getting off of the stool he was sitting on. Regardless of the how the occurrence happened, the Plaintiff has failed to present any evidence that at the time of the occurrence or prior thereto the Defendant had actual or constructive notice that the table was in a defective condition or that it was a dangerous table that had a tendency to tip over. The Plaintiff's expert affidavit stemming from an inspection of the premises more than four (4) years after the accident is not competent evidence of the condition of the table or the premises at the time of the occurrence. Additionally, there is no evidence to establish that the sign posted on the Defendant's premises which states "Please be Careful on Tall Tables" existed at the time of the occurrence to attribute notice to the Defendant of the existence of an alleged dangerous condition.

In opposition to the Defendant's *prima facie* showing, the Plaintiff has failed

to raise a triable issue of fact (*Zuckerman v. City of New York,* 49 N.Y.2d 557 [1980]).

Accordingly, it is hereby

ORDERED, that the motion by Defendant interposed pursuant to CPLR § 3212, which seeks an order granting summary judgment dismissing the within complaint is **GRANTED**; and it is further

ORDERED, that the Plaintiffs' complaint is **DISMISSED.**

This constitutes the Decision and Order of the Court.

All applications not specifically addressed are **DENIED.**

DATED: Mineola, New York
March 16, 2011

Hon. Randy Sue Marber, J.S.C.
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