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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2247-13T2

HIRAM JIMENEZ,

Plaintiff-Appellant,

v.

APPLEBEE'S NEIGHBORHOOD
GRILL & BAR, APPLEBEE'S
INTERNATIONAL, INC., and
APPLE AMERICAN GROUP, L.L.C.,

Defendants-Respondents.

Submitted February 10, 2015 - Decided March 4, 2015

Before Judges Yannotti and Fasciale.

On appeal from Superior Court of New Jersey, Law Division, Camden County, Docket No. L-1074-12.

Law Offices of Richard M. Wiener, L.L.C., attorneys for appellant (Mr. Wiener, on the briefs).

Weber, Gallagher, Simpson, Stapleton, Fires & Newby, L.L.P., attorneys for respondents (Darren C. Audino and Ryan J. Mowll, on the brief).

PER CURIAM

Plaintiff Hiram Jimenez appeals from an order entered by the Law Division on December 6, 2013, granting summary judgment in favor of defendants. We affirm.

This appeal arises from the following facts. On March 4, 2010, plaintiff met his brother Rafael at an Applebee's Neighborhood Grill ("Applebee's") in Westampton, New Jersey. After they were seated in a booth, plaintiff and his brother ordered their meals. Plaintiff ordered a steak fajita. He spoke with Rafael until a waitress brought the food to their table. According to plaintiff, his meal was served in a "sizzling skillet," which the waitress placed "right in front of [him]."

Plaintiff described the dish as "real dark," smoking, sizzling and "real hot." According to plaintiff, the waitress did not say anything when she served the food, other than to "enjoy your meal." After the waitress walked away, Rafael "reached over and said let's have prayer." Plaintiff bowed his head "[c]lose to the table." Plaintiff said he heard a loud, sizzling noise, followed by "a pop noise," and then felt a burning sensation in his left eye and on his face.

Plaintiff panicked, knocked his plate onto his lap and caused his prescription eyeglasses to fall from his face. Plaintiff said he tried to push away from the table with his right arm. He used his left arm to brush the food from his lap.

He soon felt that he had "pulled" something in his right arm. He stopped applying pressure to the table, "let [his] [right] hand go because [he] felt pain," and "banged" his elbow on the table.

Rafael called for help and the restaurant's employees came to assist. A manager eventually provided Rafael with an incident report form. The description of the incident contained on the report is as follows: "[H]ot food order[] burned me after grease popped causing several burns to face, neck, and arms." According to plaintiff's deposition testimony, the alleged burns left no scarring.

Plaintiff thereafter filed a complaint in the trial court against defendants, alleging that defendants owned, possessed, controlled, managed, operated or supervised Applebee's. Plaintiff alleged that, on March 4, 2010, while a business invitee at Applebee's, he was injured solely as a result of defendants' negligence when he came in contact with a dangerous and hazardous condition, specifically, "a plate of hot food." Plaintiff claimed he sustained serious and permanent personal injuries for which he sought damages. Defendants filed an answer denying liability and demanding judgment dismissing the complaint.

After the completion of discovery, defendants filed a motion for summary judgment. Defendants argued that, even if plaintiff established the existence of a dangerous or hazardous

condition, they were entitled to judgment as a matter of law because the condition was open, obvious and easily understood. Defendants further argued that they were entitled to summary judgment because plaintiff had not established that his damages were proximately caused by their acts or omissions. Plaintiff opposed the motion.

The motion judge considered defendants' motion, and after hearing the arguments of counsel, placed his decision on the record. The judge determined that defendants had a duty to provide their patrons with reasonably safe premises, but had no duty to warn against a danger that is open and obvious. The judge found that defendants did not breach any duty owed to plaintiff.

The judge noted that there was no dispute as to the fact that plaintiff had been served a platter of food which was sizzling, or that plaintiff opted to place his face close to the food. The judge determined that plaintiff was injured because of the actions plaintiff took with regard to a hazard that was "open and obvious." The judge concluded that defendants were entitled to summary judgment.

The judge entered an order dated December 6, 2013, memorializing his decision. However, because the order only granted summary judgment to defendant Apple American Group, L.L.C., d/b/a Applebee's Neighborhood Grill & Bar, the judge

entered another order on January 27, 2014, which also granted summary judgment to defendant Applebee's International, Inc.

On appeal, plaintiff argues that: (1) the trial court erred by finding as a matter of law that defendants did not owe him a duty; (2) the trial court erroneously assumed that plaintiff placed his face within inches of the sizzling platter and issues involving the manner in which the subject incident occurred should have been reserved for the jury; and (3) the court made an erroneous finding as to the existence and extent of plaintiff's comparative negligence which was an issue for the jury.

The trial court may grant summary judgment when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c). We apply these same standards when reviewing a trial court's order granting summary judgment. Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007).

Plaintiff argues that the motion judge erred by finding that defendants owed no duty to warn defendant of the danger posed by the sizzling plate of food that had been served to him.

There are three elements to a cause of action for negligence: "(1) a duty of care owed by defendant to plaintiff; (2) a breach of that duty by defendant; and (3) an injury to plaintiff proximately caused by defendant's breach." Endre v. Arnold, 300 N.J. Super. 136, 142 (App. Div. 1997) (citing Anderson v. Sammy Redd & Assocs., 278 N.J. Super. 50, 56 (App. Div. 1994), certif. denied, 139 N.J. 441 (1995)), certif. denied, 150 N.J. 27 (1997). The court must determine whether a duty of care exists. Ibid. (citing Wang v. Allstate Ins. Co., 125 N.J. 2, 15 (1991).

A business owner owes its invitees "a duty of reasonable or due care to provide a safe environment for doing that which is within the scope of the invitation." Nisivoccia v. Glass Gardens, Inc., 175 N.J. 559, 563 (2003) (citing Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 433 (1993); Restatement (Second) of Torts § 343 (1965)). "Th[is] duty of due care requires a business owner to discover and eliminate dangerous conditions, to maintain the premises in safe condition, and to avoid creating conditions that would render the premises unsafe." Ibid. (citing O'Shea v. K. Mart Corp., 304 N.J. Super. 489, 492-93 (App. Div. 1997)).

Here, plaintiff does not allege that there was any dangerous condition on defendants' premises. He claims, however, that the "sizzling fajita platter" created a danger to him, and argues that the motion judge erred by finding that defendants owed him no duty to warn him of the danger.

In determining whether a person owes another a duty of reasonable care, the court considers "the foreseeability of the risk of injury." Alloway v. Bradlees, Inc., 157 N.J. 221, 230 (1999) (citing Carey v. Lovett, 132 N.J. 44, 57 (1993); Weinberg v. Dinger, 106 N.J. 469, 485 (1987)). The determination of whether such a duty exists also "'involves identifying, weighing, and balancing several factors — the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution.'" Ibid. (quoting Hopkins, supra, 132 N.J. at 439).

Here, the risk of injury was foreseeable since the plate of food, as described by plaintiff, was sizzling, smoking and "real hot." The relationship of the parties was that of business owner and invitee. Moreover, once the platter was served, defendants had no control over it, and plaintiff had the opportunity and ability to act to protect himself from any danger that it posed, since the danger was open and obvious. We conclude that, balancing these factors, imposition of a duty

upon defendants to warn plaintiff of the danger presented by the sizzling hot platter is not required as a matter of fairness and sound policy.

The decision in Tighe v. Peterson, 175 N.J. 240 (2002), supports this conclusion. There, the plaintiff injured himself while diving in the sloped bottom of the shallow end of the defendants' in-ground swimming pool. Id. at 241-42. The plaintiff was the defendants' brother-in-law and he had used the defendants' pool about twenty times before the accident. Id. at 241. The plaintiff acknowledged that he was aware of where the shallow and deep sections of the pool were situated. Ibid.

The Supreme Court noted that a social host has a duty to warn a guest "of a known dangerous condition on the premises except when the guest is aware of the condition or by reasonable use of the facilities would observe it." Ibid. (citation omitted). The Court held that the defendants did not have to warn the plaintiff "where the shallow part of the pool was situated and where the shallow end began its slope downward toward the deepest portion of" the pool. Ibid.

The Court stated that, "[i]t defies notions of reasonableness to regard plaintiff as being unaware of the slope of the pool bottom, or to conclude he could not reasonably have detected it from his use of the pool that day and on the many occasions before." Id. at 242. There also was no evidence that

the defendants "encouraged a dangerous use of th[e] pool." Ibid. Under the circumstances, the defendants had no duty to warn the plaintiff. Ibid.

We reached a similar result in Longo v. Aprile, 374 N.J. Super. 469 (App. Div. 2005). In that case, the plaintiffs brought suit against their neighbors for injuries one of the plaintiffs sustained when he fell from the roof of the defendants' home while cleaning the siding. Id. at 470. We held that the plaintiff was defendants' social guest, and noted that a residential property owner does "'not have a duty to warn a social guest of a self-evident dangerous condition.'" Id. at 474 (quoting Raimo v. Fischer, 372 N.J. Super. 448, 454-55 (App. Div. 2004)). We stated that "the dangers inherent with working alone on a roof, eight feet above the ground, together with those associated with the configuration of the roof, including its narrow corner and drip ledge, were self-evident." Ibid.

Although both Tighe and Longo involved the duty that a social host owes to a guest, the principles set forth in those cases also apply to determining whether, under the circumstances presented, a business owner owes a duty to warn a patron of a dangerous condition that is open and obvious. Here, the danger posed by a plate of sizzling hot food was self-evident. Therefore, we conclude that the motion judge correctly determined that defendants had no duty to warn plaintiff that

the food was sizzling hot and should be approached with due care.

Plaintiff further argues that the motion judge erred by making a finding of fact about how the incident occurred. He contends that the judge erroneously assumed that plaintiff had placed his face within inches of the sizzling platter. However, the judge's recitation of the material facts did not include the statement that plaintiff placed his face "within inches" of the plate of hot food. Rather, the judge commented that plaintiff "bowed his head to pray and placed his face in close proximity to the sizzling food."

Moreover, there was no material dispute as to the fact that, after the hot food was served, plaintiff's brother suggested that he and plaintiff pray before they ate. Plaintiff testified at his deposition that he bowed his head close to the food to pray. As he was doing so, plaintiff heard the sizzling and a "pop." He said he then felt a burn in his left eye. Plaintiff's deposition testimony therefore established that he put his face in close proximity to the sizzling hot platter, as the judge observed.

Plaintiff also argues that the issue of whether the sizzling plate of food posed an open and obvious danger to him was an issue of fact that should not have been resolved as a matter of law. Plaintiff contends that, under Rule 4:46-2(c), he

is entitled to the benefit of all favorable inferences that could be drawn from the evidence. He contends that the judge erred by making a finding of fact as to the existence and extent of his comparative negligence.

Here, the motion judge determined that plaintiff's negligence claim failed as a matter of law because defendant owed plaintiff no duty to warn him regarding the self-evident danger posed by the sizzling plate of food. In view of that determination, the judge had no reason to make any decision as to plaintiff's comparative negligence.

Furthermore, the judge did not err by determining that there was no genuine issue of fact as to whether the platter of sizzling hot food presented an open and obvious danger to plaintiff. Where, as in this case, "there exists a single, unavoidable resolution of the alleged disputed issue of fact," that does not "constitute a 'genuine' issue of material fact for purposes of Rule 4:46-2." Brill, supra, 142 N.J. at 540 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 213 (1986)).

We conclude that the motion judge correctly determined that there was no genuine issue of material fact and defendants were entitled to judgment as a matter of law.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION