

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ELLEN EMGUSCHOWA and	:	CIVIL ACTION
EDWARD EMGUSCHOWA	:	
	:	
v.	:	
	:	
NEW YORK STEAK & SEAFOOD,	:	
<u>et al.</u>	:	NO. 96-6252

MEMORANDUM AND ORDER

Yohn, J.

August , 1997

Plaintiffs filed this diversity suit alleging that plaintiff Ellen Emguschowa was injured when she slipped and fell while leaving the defendants' restaurant in Hershey, Pennsylvania. The original complaint alleged that defendants negligently maintained the restaurant facilities, which caused Mrs. Emguschowa to trip and fall, breaking her arm. By memorandum and order dated May 9, 1997, the court granted the defendants' motion for summary judgment on plaintiffs' negligence claims based on the statute of limitations. See Emguschowa v. New York Steak & Seafood, Civ. No. 96-6252, 1997 WL 260249 (E.D. Pa. May 9, 1997). The court nevertheless allowed the plaintiffs to amend their complaint to allege a breach of warranty claim under the Uniform Commercial Code, which, although a personal injury claim, is subject to a four-year statute of limitations under Pennsylvania law. See 13 Pa. C.S.A. § 2715; Williams v. West Penn Power Co., 467 A.2d 811, 814 (Pa. 1983); Jablonski v. Pan Am. World Airways, Inc., 863 F.2d 289, 291 (3d Cir. 1988).

Plaintiffs' breach of warranty claim is based on the

allegedly defective condition of a take-out food container. Plaintiffs claim that when they left the defendants' restaurant, Mrs. Emguschowa was carrying a bag of take-out food which included a container of hot soup. She claims that the soup leaked out of the container, and burned her hand. Her left foot then got caught on some loose carpeting on the steps of the restaurant. She claims this caused her to lose her balance. She then put out her right foot, which slipped on some debris left on the steps. Plaintiff then completely lost her balance, fell, and suffered serious injuries.

Defendants claim that, even if the soup did in fact leak from the container as alleged, this leaky soup was not the cause in fact of Mrs. Emguschowa's fall. Defendants claim that, because Mrs. Emguschowa would have fallen even if the soup container did not leak, they are entitled to summary judgment. Because plaintiffs have produced insufficient evidence to suggest that the leaky soup played any role in Mrs. Emguschowa's fall, the court agrees and will grant the motion for summary judgment.

DISCUSSION

Upon motion of any party, summary judgment is to be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Where, as here, the nonmovant bears the

burden of persuasion at trial, the moving party may meet its burden "by 'showing'--that is, pointing out to the district court--that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

When a court evaluates a motion for summary judgment, "the evidence of the nonmovant is to be believed." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Furthermore, "in reviewing the record, the court must give the nonmoving party the benefit of all reasonable inferences." Sempier v. Johnson & Higgins, 45 F.3d 724, 727 (3rd Cir. 1995), cert. denied, 115 S. Ct. 2611 (1995). However, plaintiff "must present affirmative evidence to defeat a properly supported motion for summary judgment," Liberty Lobby, 477 U.S. at 257, and "the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient." Id. at 252. Rather, "where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

In order to establish a claim for breach of warranty under the UCC, plaintiff must prove that the breach of warranty caused the plaintiff's injuries. See Wisniewski v. Great Atl. & Pac. Tea Co., 323 A.2d 744, 747-48 (Pa. Super. 1974). In determining whether the breach of warranty has "caused" the injury, the court should be guided by principles of tort law. See id.

Under Pennsylvania law:

[p]roof of causation involves two elements: proof of cause in fact and proximate cause. Cause in fact or "but for" causation requires proof that the harmful result would not have come about but for the conduct of the defendant. Proximate cause, in addition, requires proof that the defendant's conduct was a substantial contributing factor in bringing about the harm alleged. Where the relevant facts show either that the defendant was not responsible for the injury, or that the causal connection between the defendant's negligence and the plaintiff's injury is remote, the question of causation is decided by the court as a matter of law.

Robertson v. Allied Signal, Inc., 914 F.2d 360, 367 (3d Cir. 1990).

In their summary judgment motion, defendants argue that the plaintiffs have failed to establish cause in fact. Under the Restatement (Second) of Torts § 432:

(1) Except as stated in Subsection (2), the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent.

(2) If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about.

Restatement (Second) of Torts § 432 (1965); see Hamil v. Bashline, 392 A.2d 1280, 1284 (Pa. 1978) (following § 432).

Mrs. Emguschowa admits that the allegedly faulty soup container would not by itself have been "sufficient to bring about the harm" which she suffered. Restatement (Second) of Torts § 432(2) (1965); see Emguschowa Dep. at 49 ("Q: But if you were walking on a dry, flat sidewalk and felt hot soup, you

wouldn't have fallen? A: No. There was a step there."). Thus, in order to survive summary judgment, plaintiffs must show that the accident would not have occurred without the spilt soup. See Hamil, 392 A.2d at 1284 ("The defendant's negligent conduct may not, however, be found to be a substantial cause where the plaintiff's injury would have been sustained even in the absence of the actor's negligence."); Robertson, 914 F.2d at 367; Markovich v. Bell Helicopter Textron, Inc., 805 F. Supp. 1231, 1238 n.10 (E.D. Pa.) ("If the plaintiffs' injuries would have occurred even in the absence of the defendants' negligence, the plaintiffs cannot recover."), aff'd 977 F.2d 568 (3d Cir. 1992).

Plaintiffs have failed to produce sufficient evidence that the accident would not have occurred absent the spilt soup. A plaintiff "must present affirmative evidence to defeat a properly supported motion for summary judgment," Liberty Lobby, 477 U.S. at 257. While plaintiff has offered no evidence whatsoever to rebut the defendant's motion, the defendants did include a copy of Mrs. Emguschowa's deposition in their motion for summary judgment, as well as an affidavit filed by Mrs. Emguschowa which was filed before the court granted summary judgment on the negligence claims.

The original complaint makes no reference whatsoever as to "spilt soup." Indeed, in an affidavit filed before the defendants' first summary judgment motion, explaining the cause of her accident, Mrs. Emguschowa made no mention of the soup having caused her fall in any way--she did not even mention the

soup. Rather, she stated that "I was caused to fall while going down the steps because of debris, foreign matter and other stuff that was on the steps and looked like it had been there for some time. The area was fairly dark and it looked like much of what was on the steps was from foods and liquids, which came from the restaurant." Emguschowa Aff. (dated Feb. 3, 1997). It was not until after the plaintiffs' attorney discovered that plaintiffs' negligence claims might be barred by the statute of limitations that the spilt soup theory was first mentioned.

In her deposition testimony, Mrs. Emguschowa explained the occurrence of the accident as follows:

I started to take a few steps and I felt the bottom of the bag on my hand and my arm was getting hotter and hotter, so as I kept walking down . . . I felt something come out and burn my hand through the bottom of the bag and I went to step down over here on the face and the carpeting was ripped, though I didn't see that at the time and my heel stuck in there and I kind of faltered and did like a pirouette and then my foot came down and there was debris and stuff on the front of the step, on the street, like papers and all and I slid and then when I fell, I hit the curb with my wrist.

Emguschowa Dep. at 22.

While this testimony indicates that Mrs. Emguschowa felt the soup spill before she fell down the stairs, it in no way indicates that the spilt soup played any role in causing her to fall down the steps. See also id. at 25-26 (Mrs. Emguschowa testified that she felt the hot soup just before she was about to step on the stairs). In fact, when questioned as to what it was that actually caused her to fall Mrs. Emguschowa explained that

the cause of her fall was the condition of the steps leading out of the restaurant:

Q: Well, did you slide or did you trip because your heel was caught?

A: No. I got caught and that's what made me fall.

Q: Your body went forward and your heel caught?

A: It was actually two, two things.

Q: Explain to me what the two things were?

A: I got caught and went down and whatever was there, I slid on it and that made me slide more. . . . Okay. I stepped down. My heel got caught. I went to step, it got caught and then my foot came down, my other foot and slipped.

Id. at 31-32.

This account of the fall once again makes no mention of the spilt soup as having anything to do with causing Mrs. Emguschowa's fall.

After a prompted question from her attorney, Mrs. Emguschowa did indicate that the spilt soup may have been a "catalyst" of some sort in causing the chain of events which led to the fall. See id. at 48-49 ("Q: If you had to look back on it now and pick out a catalyst or cause that initiated this whole sequence, what would you say it was? A: The food, the bag."). But the fact that Mrs. Emguschowa believes that the spilt soup initiated the chain of events--that it happened before she fell--does not mean that the soup was the cause in fact of her injury. The soup would only be the cause in fact of her fall if she would not have fallen "but for" the spilt soup. But when asked to definitively

state that the accident would not have occurred without the leaky soup, not even Mrs. Emguschowa could definitively state that this was the case:

Q: But if you were walking on a dry, flat sidewalk and felt hot soup, you wouldn't have fallen?

A: No. There was a step there.

Q: And your food [sic] got caught, right?

A: Yes.

BY MR. FEINGOLD:

Q: If the soup didn't fall and if it didn't burn you when you stepped down, would you have stepped in the area of the carpet?

A: I might have. It's hard to say.

Q: Why?

A: Because I couldn't see it. It was dark.

Id. at 49-50 (emphasis added).

Far from indicating that the soup was the cause in fact of her injury, this testimony indicates that she fell because it was dark and she could not see the steps, not because the soup spilled from its container.

Plaintiff has the burden of proving that the defendant's conduct caused her injury. See Flaherty v. Pennsylvania R.R. Co., 231 A.2d 179, 180 (Pa. 1967); see also Myers v. Penn Traffic Co., 606 A.2d 926, 930 (Pa. Super. 1992) (plaintiff must present evidence of causation to exclude one factor rather than

another).¹ The only direct evidence which would show that the accident would not have occurred but for the leaky soup is Mrs. Emguschowa's claim that it might have or it might not have. "A jury may not be permitted to reach its verdict on the basis of speculation or conjecture; there must be evidence upon which its conclusion may be logically based." Cuthbert v. Philadelphia, 209 A.2d 261, 264 (Pa. 1965); see Galullo v. Federal Express Corp., 937 F. Supp. 392, 398-99 (E.D. Pa. 1996) ("[W]hat caused her to fall could only be a guess, and that is not sufficient to take a case to the jury." (quoting Watkins v. Sharon Aerie No. 327 Fraternal Order of Eagles, 223 A.2d 742, 745 (Pa. 1966))); Markovich, 805 F. Supp. at 1238 ("a jury verdict cannot be based on mere speculation"); Restatement (Second) of Torts § 433B

¹ It is true, as plaintiffs argue, that an accident can have more than one cause. However, the plaintiff may not recover unless the cause upon which she bases her claim meets both standards for causation--cause in fact, and proximate causation. Thus, claims for multiple causes are only viable where both causes are independently sufficient to cause the injury, see Restatement (Second) of Torts § 432(2), or where neither cause alone is sufficient to cause the injury, but the combination of those causes is sufficient to cause the injury.

In this case, Mrs. Emguschowa has made clear that the soup alone was not sufficient to cause the injury. See Emguschowa Dep. at 49. To the contrary, it appears undisputed that the condition of the stairs caused plaintiff to fall.

Upon this matter she has the burden of proof. This is not a case where one defendant is wholly responsible, but it is uncertain which one of those defendants is responsible. See Skipworth v. Lead Indus. Assoc., 690 A.2d 169, 174 (Pa. 1997) (discussing alternative liability theory). In those cases, the defendant has the burden of proof. See Restatement (Second) of Torts § 433B(3) (1965). Because it is certain that the stairs played at least some role in the fall (if not the entire role), that section of the Restatement does not apply. See Restatement (Second) of Torts § 433B, cmt. g (1965).

(1965) ("A mere possibility of causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant."); see also Fedorczyk v. Caribbean Cruise Lines, Ltd., 82 F.3d 69, 75 (3d Cir. 1996) (accord under New Jersey Law).

Here, the only direct evidence offered by the plaintiff, her own testimony, cannot even be expressed with any degree of certainty. Were the plaintiff able to state, with some certainty, that she would not have fallen but for the leaky soup, there might be sufficient evidence to reach a jury on causation in fact, and the jury would be entitled to judge plaintiff's credibility as to this statement. But cf. Cuthbert, 209 A.2d at 616 (even where testimony by plaintiff was that she "knew" what caused her accident, that testimony was insufficient if plaintiff is merely conjecturing). If the only evidence of causation is direct testimony that defendant's negligence might have caused the plaintiff's injury, there is insufficient evidence upon which the jury may make a finding of causation. See Reddington v. City of Phila., 98 A. 601, 601-02 (Pa. 1916) (non-suit entered where plaintiff could not testify with certainty as to what caused her to fall); Niggel v. Sears, Roebuck & Co., 281 A.2d 718, 719 (Pa. Super. 1971).

Plaintiffs have the burden of establishing causation in

fact.² Because Mrs. Emguschowa herself cannot testify to any degree of certainty that the accident would not have occurred but for the spilt soup, there is no competent evidence of causation in fact. Defendants are therefore entitled to summary judgment. An appropriate order follows.

² Even if the plaintiffs were able to establish cause in fact, they certainly would not have been able to establish that the spilt soup was a substantial factor in causing Mrs. Emguschowa's fall.

Proximate cause is "essentially an issue of law, i.e., whether the defendant's negligence, if any, was so remote that, as a matter of law, he cannot be held legally responsible for harm which subsequently occurred." . . . "[A] determination of legal causation 'depends on whether the conduct has been so significant and important a cause that the defendants should be legally responsible. . . . [T]hey depend essentially on whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred."

Matos v. Rivera, 648 A.2d 337, 340 (Pa. Super. 1994) (citations omitted), appeal denied, 658 A.2d 795 (Pa. 1995).

Even if the soup had played a role in the Mrs. Emguschowa's fall, that role would have been so insignificant and unimportant that the court would have found proximate cause lacking as a matter of law.

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ORDER

AND NOW, this day of August, 1997, after consideration of the defendants' motion for summary judgment, the plaintiffs' response thereto, the defendants' reply, and the plaintiffs' supplemental memorandum in opposition to summary judgment, IT IS HEREBY ORDERED that defendants' motion for summary judgment is GRANTED and JUDGMENT IS ENTERED in favor of defendants and against plaintiffs.

William H. Yohn, Jr., Judge