

**Arencibia v Joe's Place of the Bronx, NY, Inc.**

2015 NY Slip Op 31150(U)

June 1, 2015

Supreme Court, Bronx County

Docket Number: 306184/2012

Judge: Alison Y. Tuitt

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NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

LILIANE ARENCIBIA, PETER ARENCIBIA and  
KATARZYNA M. ARENCIBIA,

INDEX NUMBER: 306184/2012

Plaintiff,

-against-

Present:  
HON. ALISON Y. TUITT  
*Justice*

JOE'S PLACE OF THE BRONX, NY, INC. d/b/a  
JOE'S PLACE RESTAURANT,

Defendants.

The following papers numbered 1-3,

Read on this Defendant's Motion for Summary Judgment

On Calendar of 12/15/14

Notice of Motion-Exhibits, Affirmation 1

Affirmation in Opposition 2

Reply Affirmation 3

Upon the foregoing papers, defendant's motion for summary judgment is denied for the reasons set forth herein.

This is an action for personal injuries arising out of an alleged food poisoning incident when plaintiffs purportedly developed Salmonella poisoning after eating take-out food from defendant's restaurant, Joe's Place of the Bronx, NY, Inc. d/b/a Joe's Place Restaurant (hereinafter "Joe's Place") on August 10, 2011. As a result, plaintiffs Liliane Arencibia (hereinafter "Liliane") and Katarzyna Arencibia (hereinafter "Katarzyna") allege they both began to get violently ill at approximately 3:00 a.m. on August 11, 2011, and both were hospitalized on August 11, 2011 through August 15, 2011, with what was eventually diagnosed as Salmonella poisoning. Plaintiff Peter Arencibia (hereinafter "Mr. Arencibia") alleges that he became ill on

August 12, 2011 and was hospitalized from August 31, 2011 through September 7, 2011 due to reactive arthritis related to Salmonella poisoning.

Plaintiff Liliane testified at her deposition that prior to eating defendant's food at her son Paulo and daughter-in-law Katarzyna's home, she consumed two pieces of sushi at 3:00 or 4:00 p.m. that were left over from what Katarzyna had purchased the night before on August 9, 2011. Plaintiff Mr. Arencibia, Liliane's husband, went to the home at approximately 3:00 p.m. with food from Joe's Place which was placed in the refrigerator. He had purchased two Cuban sandwiches, roast pork, yellow rice, red beans, salad and bread. They had ordered takeout food from Joe's Place on four or five previous occasions. Liliane, Mr. Arencibia, Paulo and Katarzyna ate the food around 7:30 or 8:00 p.m. Plaintiff Liliane put the pork, rice and beans in the oven about 10 minutes at 375 degrees to heat it up prior to them eating. She described the food as tasty and everyone had a sampling of the sandwiches, pork, rice and beans. Liliane testified that she was awakened by severe cramps, diarrhea and nausea at 2:00 or 3:00 a.m. She continued to be sick into the morning and she stayed in bed all day. At some point in the afternoon, her husband came back into the bedroom with their daughter-in-law Alana Orkin, who is a physician and is married to their other son, Albert. Ms. Orkin advised that she should go to the hospital immediately. She went to North Shore University Hospital and was admitted from August 11, 2011 through August 15, 2011, where she was diagnosed with Salmonella

Mr. Arencibia testified consistent with his wife at his deposition. He ordered the food from Joe's Place which consisted of roast pork, yellow rice, red beans and Cuban sandwiches that came with salad and bread. He arrived at his son and daughter-in law's house at approximately 3:00 p.m., he placed the food in the refrigerator and the food was reheated before they ate it. He awoke the next morning at approximately 8:00 a.m. and learned that his wife had been sick since about 3:00 a.m. She stayed in bed all morning and afternoon and had diarrhea and was almost unresponsive. His daughter-in-law, Alana, came over and observed Liliane and told him he should take his wife to the hospital where she was admitted. Mr. Arencibia testified that he began to feel sick the next day, August 12, 2011 while he was at the hospital caring for his wife. He began taking Cipro, an antibiotic, the following day when his son Paulo gave him the pills and he took them for six days. He was having the same symptoms as his wife which included a temperature of 100-101 degrees, cramps and diarrhea. Paulo obtained the Cipro from Katarzyna's doctor at the hospital in Westchester County where she was admitted. His son advised him that they were all suffering the same symptoms from eating the same food.

On August 18, 2011, approximately eight days after ingesting the subject food, Mr. Arencibia awoke and his foot was incredibly swollen and red and he was unable to walk. As a result he went to FirstMed where x-rays were taken and were negative for a fracture. The following day, on August 19, 2011, he went to see Dr. Green, his internist, who initially thought he was suffering from gout and gave him an anti-inflammatory medication. There was no change to his condition and on August 22, 2011, he went to see Dr. Goldberg, his regular physician, who performed a blood test that indicated that he had an infection and he continued on the medication. On August 31, 2011, he woke up with excruciating pain in his right foot and knee and he called his son Albert who took him to North Shore University Hospital where he was admitted until September 7, 2011. Mr. Arencibia testified that when he arrived at the hospital and consistently throughout his time he was there, the diagnosis was septic arthritis which result from an infection of the joints, or reactive arthritis which is also results from an infection. While in the hospital he was treated by a rheumatologist and also an infectious disease doctor, Dr. Hirschwerk. He testified that his blood work was negative for Salmonella. After his discharge, he saw Dr. Hirschwerk who started him on a course of IV antibiotics for three weeks to be certain that he was not suffering from septic arthritis. Mr. Arencibia further testified that on October 7, 2011, he first treated with Dr. Given, a rheumatologist, and found that Mr. Arencibia carried a gene know as HLA B27, which is triggered by certain infections including Salmonella and causes reactive arthritis

Plaintiff Katarzyna testified at her deposition that on August 10, 2011, her father-in-law brought food from Joe's Place which she helped put in the refrigerator. The day before the incident, she had purchased a California Roll sushi from Whole Foods Market in White Plains and ate most of the small tray. She had no issues or ill-effects from eating the sushi and felt fine until after she consumed the food from Joe's Place. Her children did not eat any of the food from Joe's Place and she prepared them different food. She ate yellow rice, beans, pork and Cuban sandwich. About 3:00 a.m., Katarzyna awoke with strong abdominal pain and had diarrhea and vomiting. She continued to be sick and was unable to go back to bed for the rest of the night. Her husband Paulo called his sister-in-law but Katarzyna was unable to speak with her because she was in such a bad state. She was admitted to Phelps Memorial Hospital for five days with a diagnosis of Salmonella poisoning. On her second day at the hospital, her husband started to become ill with stomach pains and cramps. Katarzyna further testified that Dr. Julie Torman confirmed that she had Salmonella poisoning and opined that Paulo was also suffering from Salmonella based on his symptoms. About three days after she was discharged

from the hospital, Katarzyna saw Dr. Miller, an infections disease doctor who confirmed that she was suffering from an internal fever. She also followed up with her general practitioner on or about August 22, 2011 as she was still suffering from the effects of the Salmonella poisoning.

Joe Torres, the owner of Joe's Place, testified at his deposition regarding the custom and practice of handling food at his restaurant. The pork is roasted in ovens at 350 degrees. Meat deliveries to the restaurant were on Mondays and the meat would be kept in a walk-in refrigerator that was kept under 40 degrees. The meat would be kept in the refrigerator until it was ready to be seasoned and then it would be put in the oven. They would prepare the meats on cutting boards which would be cleaned with detergent. There were different cutting boards for meats and vegetables and each time a cutting board was used, it would be placed in the sink with dishwashing detergent. Mr. Torres further testified that one of his employees, Ralph, would typically cook the pork with Mr. Torres supervising him, and Ralph always cooked the meat appropriately. Thermometers gauged the temperature of the cooking. Mr. Torres stated that the thermometers were always functioning properly because the Board of Health often performed inspections on them. Mr. Torres further testified that his cooks and wait staff had food safety training courses that were given through or by the New York City Department of Health and his employees would receive a Food Handling Permit. Mr. Torres claimed that he did not recall whether his restaurant ever received any violations for unsanitary conditions; improperly or failing to use thermometers to monitor food temperature; food contamination; spoiled food; and/or house flies, bottle flies or flesh flies. Additionally, he denied ever receiving a violation for the lack of cleanliness in his employees, including violations for outer garments being soiled with possible contaminants. He also denied every receiving a violation for failing to keep the restaurant vermin proof or for grease build-ups. Mr. Torres did admit that the Department of Health closed his restaurant, however, he did not recall if it was before or after August 10, 2011. He did not recall how many times the restaurant was shut down by the Department of Health. Mr. Torres also admitted that the restaurant had been sued before by patrons who had developed food poisoning as a result of eating his food.

Plaintiff submits uncertified documents purporting to show violations issued to Joe's Place from the Department of Health as follows: 1) On October 17, 2011, the first inspection after the subject incident where Joe's Place was shut down because of numerous "critical" violations, including not storing hot food items at or about 140 degrees, filth, flies or food/refuse/sewage associated (FRSA) flies present in the facilities's food

and/or non-food areas, wiping cloths soiled and not stored in sanitizing solutions and the store was not vermin proof; 2) On May 19, 2011, the store received a grade of "C" and received "critical" violations including food not cooled by an approved method whereby the internal product temperature is reduced from 140 to 70 degrees or less within two hours from 70 to 41 or less degrees within four additional hours; appropriately scaled metal stem-type thermometer or thermocouple not provided or used to evaluate temperatures of potentially hazardous foods during cooking, cooling, reheating and holding; and, food not protected from potential source of contamination during storage, preparation, transportation, display or service.

Defendant moves for summary judgment arguing that plaintiffs fail to prove a prima facie case of negligence against defendant. Defendant argues that plaintiffs cannot prove that the source of their alleged poisoning came from the food they consumed from defendant's restaurant. Defendant references the hospital records for Liliane where it provides that "Pt states she and daughter-in-law ate day old sushi after which symptoms began." Defendant further contends that plaintiff Peter Arencibia's medical issue, an Osteoarthritic condition, had no nexus to alleged Salmonella or food poisoning. It should be noted that there are several inconsistencies in defendant's representation of the testimony of the parties. Defendant's counsel provides in his affirmation that Liliane testified that both she and her daughter-in-law Katarzyna consumed day old sushi. "LILIANE ARENCIBIA testified that prior to eating the food from the defendant's restaurant, she consumed day old sushi with her daughter in law during the afternoon of this incident. (Exhibit "B", page 16)." That is a gross misrepresentation of Liliane's actual testimony which was as follows - "Q Did you have sushi with your daughter that afternoon? A I had sushi by myself, just standing by the refrigerator, as a snack that was left over." Moreover, defendant's counsel states that "LILIANE ARENCIBIA testified that the adults did not eat dinner right away, but that the children ate first. (Exhibit "B", Page 24). (Conspicuously absent is the fact that the children did not become sick as a result of consuming the defendant's food.)" This statement is wholly disingenuous and misrepresents Liliane's testimony wherein she clearly testified that the two children did not eat defendant's food (Exhibit "B", Page 20). Specifically, the testimony was as follows: "Q. Do you know when your son arrived home that day? A. Around 6:30. Q. Did you have dinner then? A. Not right away. The kids ate first. Q. Did the kids eat the Cuban food, or did they have children's food? A. They had other children's food. Chicken cutlets, I believe." (Exhibit "B", pages 24-25). Defense counsel again misrepresents the deposition testimony wherein he states that "[t]he Court is reminded that Katarzyna also consumed this day old

sushi as well.” Katarzyna testified that she had purchased the sushi at a Whole Food store the day before, on August 9, 2011, and she had eaten it on that day. There were two pieces of sushi left over which she put into her refrigerator and her mother-in-law ate the next day.

Plaintiffs argue that summary judgment must be denied as there are issues of fact as to whether defendant’s food was tainted and whether this tainted food caused plaintiff’s injuries and damages. Plaintiffs contend that the multiple Department of Health violations not only raise issues regarding Mr. Torres’ veracity, but when combined with plaintiffs’ history, medical records and expert affirmations, create questions of fact as to whether defendant properly prepared, cooked and stored the food that plaintiffs consumed.

The court’s function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the “burden of production” (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1<sup>st</sup> Dept. 1997).

In a case involving food poisoning, plaintiff has the burden of proving that food was defective and that her injury resulted from its consumption. Valenti v. Great Atlantic & Pacific Tea Co., 615 N.Y.S.2d 84 (2d Dept. 1994). In Valenti, the Court held that plaintiff could not recover damages for personal injuries, namely, nausea, vomiting, and diarrhea, which allegedly resulted from her seeing and/or eating worm which was

contained in a can of string beans because she failed to submit any probative evidence which would have established that her symptoms were caused by a foreign object in the can of beans. The Court noted that the mere fact that the plaintiff became nauseous about one-half hour after consuming some of the contents of the can is insufficient to withstand the defendants' motion for summary judgment. "There are many different causes of nausea, vomiting and stomach distress". Id. Similarly, the First Department held that plaintiff's complaint was properly dismissed in light of the absence of any non-speculative ground to support the inference that the allegedly offending food was in fact contaminated or that the complained-of blood disorder was causally related to food poisoning. Williams v. White Castle Systems, Inc., 772 N.Y.S.2d 35 (1<sup>st</sup> Dept. 2004). In Williams, the Court noted that while plaintiff's treating physician hypothesized that plaintiff's TTP condition could be caused by food-borne pathogens, no scientific evidence was offered in support of this theory, much less was there evidence that plaintiffs had ingested a particular pathogen causally associated with TTP. In Brown v. City Sam Restaurants, Inc., 666 N.Y.S.2d 409 (1<sup>st</sup> Dept. 1998), the First Department held that it was mere speculation to attribute plaintiff's flu-like symptoms to his consumption of unwholesome or contaminated lobster at defendant's restaurant, where it was undisputed that plaintiff had eaten other foods earlier that day, that he had a known food allergy to some shellfish, that no one else in his dinner party became sick, and where his own medical evidence was inconclusive as to the cause of his symptoms.

On a motion for summary judgment, defendant must show that the subject food was properly prepared, cooked, stored and served. Amit v. Hineni Heritage Center, 856 N.Y.S.2d 146 (2d Dept. 2008). In Amit, the Court denied defendant's motion for summary judgment where shortly after returning home from a dinner, the plaintiff became ill, and the undisputed evidence showed that, of the 70 to 80 dinner guests, at least a dozen other people became ill that night. The plaintiff was later diagnosed as suffering from "food poisoning" and "food-related gastroenteritis." In Jaroslavicz v. Prestige Caterers, Inc., 739 N.Y.S.2d 670 (1<sup>st</sup> Dept. 2002), the First Department held that plaintiff raised a genuine issue of material fact as to whether food poisoning allegedly suffered by him and his subsequently developed neurological disorder were caused by his ingestion of improperly cooked or handled food. The Court noted that although defendants maintained that there was no basis for plaintiff's claim that food consumed on their tour was the cause of his illness, the statement of their expert that there is "insufficient information" to conclude that plaintiff's illness was brought about by the ingestion of improperly cooked or handled food was not adequate to meet defendants' burden as summary



judgment movants to demonstrate their prima facie entitlement to judgment as a matter of law.

In the instant matter, the motion for summary judgment must be denied. It is undisputed that the plaintiffs became sick after eating the same food from defendant's restaurant. While both Liliane and Katarzyna consumed some California Roll sushi, plaintiffs have raised an issue of fact as to whether it was defendant's food that made them ill. The sushi was only consumed by two of the plaintiffs. However, all three plaintiffs consumed defendant's food and all three became sick. Both Liliane and Katarzyna were taken to the hospital the day after consuming defendant's food, both were admitted and both were diagnosed with Salmonella poisoning. Plaintiffs submit the affirmations of Dr. Jeffrey Perry who states that he reviewed the plaintiffs' bill of particulars, the deposition transcripts and the hospital and medical records pertaining to the plaintiffs. Dr. Perry states that according to the plaintiffs, they all consumed takeout food from Joe's Restaurant and that was the only food that all four of them, plaintiffs Liliane, Katarzyna, Mr. Arencibia and his son Paulo, ate in common over the days prior to August 10, 2011. Both Liliane and Katarzyna awoke about 6 hours after ingesting the food in severe distress with stomach cramps and diarrhea, and both women were admitted to the hospital and tested positive for Salmonella enterocolitis, group type B. Dr. Perry states that Liliane was seen by various specialists and was placed on a course of Cipro, which is standard care for treating Salmonella. Dr. Perry further states that Katarzyna was also seen by various specialist while she was hospitalized and was place on a course of IV Levaquin antibiotics and was discharged on a course of oral levofloxacin medication. With respect to Liliane and Katarzyna, Dr. Perry states that it is his opinion to a reasonable degree of medical certainty that they suffered from Salmonella enterocolitis and that the source of infection was tainted food from defendant's restaurant. Dr. Perry states that the basis of his opinion is that this was the only food in common that was ingested by the three plaintiffs and Paulo Arencibia and all four came down with symptoms of Salmonella poisoning within 6 to 36 hours of ingesting the food, which is well within the incubation period for Salmonella infection.

With respect to Mr. Arencibia, Dr. Perry states that he reviewed plaintiff's hospital records, the records of Dr. Given, a treating rheumatologist, Dr. Rokito, plaintiff's treating orthopedist, as well his treating primary care physician, Dr. Goldberg. Dr. Perry notes that approximately 36 hours after consuming defendant's food, plaintiff Mr. Arencibia and Paulo began to experience the same severe stomach cramping, diarrhea, stomach pain and weakness as Liliane and Katarzyna. Mr. Arencibia stated that his son Paulo talked to a

physician about their symptoms and Mr. Arencibia took Cipro antibiotic that had been prescribed to his son and their stomach symptoms subsided. However, Mr. Arencibia claimed that he developed pain and swelling initially in his right foot and ankle and then in his right knee. He was followed by Dr. Goldberg who thought he was suffering from gout and began a course of treatment of corticosteroids. However, subsequent testing did not reveal any abnormal uric acid results and he was admitted to the hospital one week later when his condition worsened. Mr. Arencibia was hospitalized for one week and was seen by a rheumatologist who diagnosed Reactive Arthritis secondary to Salmonella infection. Upon his release, he began treating with Dr. Given who found that plaintiff tested positive for HLA B27 gene, which Dr. Perry states is also evidence of and supportive of a diagnosis of Reactive Arthritis. Dr. Given treated Mr. Arencibia through April 20, 2012. Based on the above, it is Dr. Perry's opinion to a reasonable degree of medical certainty that Mr. Arencibia suffered from Reactive Arthritis secondary to Salmonella infection and the source of the Salmonella infection was tainted food from defendant's restaurant. The basis for his opinion is that the only food in common that was ingested by the three plaintiffs and Paulo Arencibia and all four individuals came down with symptoms of Salmonella poisoning within 6 to 36 hours of ingesting the food, which is well within the incubations period for Salmonella infection.

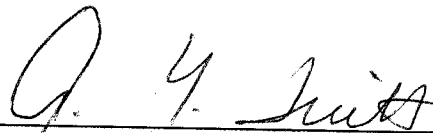
While defendant is correct that the violation information regarding defendant's restaurant from the Department of Health is not in admissible form, the Court may consider hearsay evidence so long as there is other admissible evidence which there is in the instant matter. See, Rodriguez v. Sixth President, Inc., 771 N.Y.S.2d 368 (1<sup>st</sup> Dept. 2004); Arnold v. New York City Housing Authority, 745 N.Y.S.2d 26 (1<sup>st</sup> Dept. 2002); Narvaez v. NYRAC, 737 N.Y.S.2d 76 (1<sup>st</sup> Dept. 2002); Guzman v. L.M.P. Realty Corp., 691 N.Y.S.2d 483 (1<sup>st</sup> Dept. 1999); Thomas v. Our Lady of Mercy Medical Center, 734 N.Y.S.2d 33 (1<sup>st</sup> Dept. 2001). Moreover, while defendant argues that the medical records submitted by plaintiff are not certified, defense counsel relies very heavily on a portion of those medical records to argue that plaintiffs Liliane and Katarzyna's food poisoning came from sushi and not Joe's Place. Defendant submits portions of the medical records that are also uncertified. See, Carlton v. St. Barnabas Hospital, 937 N.Y.S.2d 57 (1<sup>st</sup> Dept. 2012)(Plaintiff's argument that defendant's experts relied on inadmissible evidence where plaintiff herself relied on the uncertified medical records in opposition to defendant's motions); see also, Toledo v. A.P.O.W. Auto Repair Towing, 762 N.Y.S.2d 495 (1<sup>st</sup> Dept. 2003) (Court may rely on plaintiff unaffirmed reports when it is affirmatively relied on in the first

instance by defendants).

Accordingly, the testimony of the plaintiffs together with the affirmations of Dr. Perry and the information regarding the violations found by the Department of Health at Joe's Restaurant both before and shortly after plaintiffs' Salmonella poisoning, including Mr. Torres own admissions that his restaurant was shut down by the Department of Health as a result of violations, raise issues of fact as to whether the source of plaintiffs' Salmonella poisoning resulted from food they consumed from defendant's restaurant. Therefore, defendant's motion for summary judgment is denied.

This constitutes the decision and Order of this Court.

Dated: 6/11/15

A handwritten signature in cursive script, appearing to read "A. Y. Tuitt", is written over a horizontal line.

**Hon. Alison Y. Tuitt**