This opinion is uncorrected and subject to revision in the Official Reports. This opinion is not available for publication in any official or unofficial reports, except the New York Law Journal, without approval of the State Reporter or the Committee on Opinions (22 NYCRR 7300.1)

Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES **PART 17**
Justice

----------X

JOHN SMITH and VIRGINIA SMITH,
Plaintiff,

Index No.: 11271/00
Motion Date: 6/5/02
Motion Cal. No.: 30

-against-

BIAGELS UNLIMITED, INC. d/b/a HOT BAGELS
Defendant.

----------X

The following papers numbered 1 to 10 read on this motion by defendant for summary judgment in its favor pursuant to CPLR § 3212 and dismissing the complaint.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits.....	1-4
Memorandum of Law.....	5
Affirmation in Opposition-Exhibits.....	6-8
Reply Affirmation.....	9-10

Upon the foregoing papers it is ordered that the motion for summary judgment is granted, for the following reasons:

It is axiomatic that the Summary Judgment remedy is drastic and harsh and should be used sparingly. The motion is granted only when a party establishes, on papers alone, that there are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side's papers do not suggest any issue exists. Moreover, on this motion, the court's duty is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. *See*, Barr v County of Albany, 50 NY2d 247 (1980); Miceli v Purex, 84 AD2d 562 (2d Dept. 1981); Bronson v March, 127 AD2d 810 (2d Dept. 1987). Finally, as stated by the court in Daliendo v. Johnson, 147 AD2d 312, 317 (2d Dept. 1989), "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied."

According to plaintiffs, the action herein stems from a cup of coffee being

purchased from defendant's establishment, located at 221-18 Horace Harding Boulevard, Bayside, New York. Plaintiff, John Smith, (hereinafter plaintiff) attempted to drink the coffee, but found it to be too hot to consume, so he removed the lid and put it down in the center console of the parked vehicle in which he was seated. Shortly thereafter, the cup was knocked over and the coffee came into contact with plaintiff's left leg, ankle and foot, causing 2nd and 3rd degree burns and scarring. Thereafter, this action to recover damages was commenced.

Defendant has now moved for summary judgment on the following grounds: that plaintiff has presented no evidence that the coffee was purchased at the defendant's premises; that plaintiff has not established that defendant's actions were the proximate cause of his injury; and that plaintiff has not established that defendant's acted unreasonably and breached any duty of care. Plaintiff opposes this motion, contending, inter alia, that the evidence establishes that the coffee was purchased at defendant's premises and that there are triable issues of fact regarding whether the coffee was defective by virtue of its temperature and whether defendant had a duty to warn of the temperature of the coffee.

The branch of the motion based upon defendant's claim that plaintiff has failed to establish that the coffee was purchased at defendant's premises is without merit. During his deposition on September 4, 2001, plaintiff was unable to state with any specificity that the coffee was purchased at defendant's premises. However, in his affidavit, dated April 22, 2002, which was submitted in response to the instant motion, plaintiff unequivocally states that he purchased the coffee at defendant's premises.

Although issues of credibility are generally the exclusive province of the jury, in deciding a summary judgment motion a court need not discard common sense and common knowledge. When the court is confronted with evidence that is incredible or highly improbable, such may be disregarded. Here there is no explanation as to why plaintiff could not recall the location the coffee was purchased during his deposition, yet somehow recalled it sufficiently at the time the affidavit was prepared. Accordingly, the court finds that his affidavit merely sets forth a feigned fact designed to avoid the consequences of his earlier statements. *See*, Nieves v. ISS Cleaning Services Group, Inc., 284 AD2d 441(2d Dept. 6/18/01.) However, the affidavit of Robert Murphy, dated

March 19, 2002, sufficiently establishes that the coffee was bought at defendant's premises, located at 221-18 Horace Harding Boulevard, Bayside, New York.

Defendant has presented sufficient evidence to support its claims that plaintiff has not established that defendant's acted unreasonably and breached any duty of care and that plaintiff has not established that defendant's actions were the proximate cause of his injuries. Accordingly, plaintiff must come forth with evidence that the coffee, or its container, was defective or negligently served to plaintiff by defendant and that the defect or the negligence was a proximate cause of John Smith's injuries.

The evidence of the temperature of the coffee served to plaintiff shows that defendant's general practice was to brew coffee at a temperature of 200 degrees Fahrenheit and to keep the coffee at about the same temperature while holding it thereafter. Plaintiff's expert concedes that the industry standard requires coffee to be brewed at 200 degrees, however, he claims that the hold temperature must be set about 40 degrees lower.

However, this argument ignores the fact that coffee might be purchased immediately after being brewed, or before it has cooled on the holding plate, and, thus, there is no meaningful distinction between the brewing temperature and the holding temperature. As such, plaintiff has failed to show that defendant's coffee was unreasonably hot. Additionally, even though the coffee was hot enough to cause an injury, that does not establish a defect or negligence in service. As stated by the court in Huppe v Twenty-First Century, 130 Misc. 2d 736 (Sup. Ct. Broome County 1986), aff'd 116 AD2 797 (3rd Dept 1986), " Where, as here, a product by its very nature has a dangerous attribute, liability is imposed only when the product has an attribute not reasonably contemplated by the purchaser or is unreasonably dangerous for its intended use. Since plaintiff clearly intended to purchase hot coffee and since coffee is customarily served and intended to be consumed as a hot beverage, plaintiff must present evidentiary facts establishing that the coffee served by defendant was defective or unreasonably dangerous by virtue of being hotter than it should have been."

As stated above, plaintiff has failed to meet this burden with their expert's evidence. His other evidence on this issue is equally lacking since it consists merely of plaintiff's and a co-worker's conclusory assertions that the coffee was extremely hot.

Since plaintiff has failed to show that the coffee was so hot that it exceeded the reasonable or customary standards for such a product, there is no evidence from which a trier of fact could conclude that the coffee was defective, unreasonably dangerous, or negligently served.

Similarly, plaintiff's claim that defendant violated the safe custom and practice of the industry in failing to serve the coffee in proper containers, including cups and lids with adequate and acceptable warnings that the coffee was hot, is without merit. Clearly, plaintiff considered and knew that the coffee was hot, prior to the injury. "While the obviousness of a dangerous condition is now generally considered only in connection with assessing comparative fault here the hotness of the coffee was such an essential and intended attribute of the product that defendant had a duty to warn of its temperature only if it exceeded the reasonable range of temperature for such a product." *Id.* Again, the coffee was not hotter than acceptable standards permit and plaintiff was fully aware of the amount of heat contained in the coffee. As such, there was no reason for him to have been warned of an attribute that he was well aware.

Furthermore, there is no indication that the cups failed to contain their contents under foreseeable conditions where they would reasonably be expected to do so. In fact, plaintiff removed the lid even though he was aware of the coffee being too hot to drink, thereby eliminating a primary source of protection. There is no duty for a manufacturer or seller of a product to create safety features that will protect a user no matter how careless the user may be. *See*, Robinson v Reed-Prentice Div. of Package Mach. Co., 49 NY2d 471. Even if spill-proof cups are available, there is nothing to suggest that a cup with a properly fitted lid is below the customary or reasonable standard for serving coffee. Consequently, the court finds that there is insufficient evidence of a defective product, a failure to warn, or negligence to raise a triable issue of fact as to the liability of defendant for plaintiff's injuries.

Plaintiff has also failed to meet his burden of showing that the defect or the negligence was an actual and proximate cause his injuries. Plaintiff does not claim that any attribute of the coffee or its container or the lack of warnings resulted in the spill and contact of the coffee with his body. In fact, after plaintiff removed the protective lid, his co-worker knocked the coffee cup down with a ladder. In any event, plaintiff has failed to

submit any competent evidence to show that, had the holding temperature of the coffee been set at a lesser amount, he would not have sustained burns of a lesser degree than he did. Therefore, the court finds that the temperature of the coffee was not a cause of the injuries in a manner to warrant the imposition of liability. *See*, Sheehan v City of New York, 40 NY2d 496, 503.

Finally, there is no evidence that a warning would have in any way minimized plaintiff's injuries or allowed him to avoid being injured. As noted above, prior to the accident, plaintiff was aware that the coffee was hot and that hot beverages could burn. Accordingly, plaintiff has not raised a triable issue of fact as to whether or not defendant's failure to warn, if there was such a duty, caused the spill or contributed to the severity of his injuries. *See*, Torrogrossa v Townmotor Co., 44 NY2d 709, 711.

Accordingly, the court finds as a matter of law plaintiff has failed to submit sufficient evidence to support any of his causes of action and defendant is entitled to summary judgment and the dismissal of the entire complaint.

Dated: June 11, 2002

.....

ORIN R. KITZES, J.S.C.