

Schwartz v Bleu Evolution Bar & Rest. Corp.

2011 NY Slip Op 30938(U)

April 11, 2011

Supreme Court, New York County

Docket Number: 117377/2006

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: *Saliann Scarpulla*

PART 19.

Index Number : 117377/2006

SCHWARTZ, JULIA

vs

BLEU EVOLUTION BAR & REST.

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is determined*
in accordance with the accompanying
decision/order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

APR 13 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 4/11/11

Saliann Scarpulla
SALIANN SCARPULLA
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X
JULIA SCHWARTZ,

Plaintiff,
-against-

Index No.: 117377/06
Submission Date: 1/19/11

BLEU EVOLUTION BAR & RESTAURANT CORP.
S/H/A BLEU EVOLUTION BAR & RESTAURANT
CORP. AND 593 FORT WASHINGTON L.L.C.,

DECISION AND ORDER

Defendants.

-----X
For Plaintiff: Grover & Fensterstock P.C.
750 Third Avenue - Suite 900
New York, NY 10017
For Defendants: Lewis Brisbois Bisgaard & Smith LLP
17 Water Street, 21st Floor
New York, NY 10005

Papers considered in review of this motion for summary judgment:

- Notice of Motion 1
- Aff in Opp 2
- Reply 3

FILED
APR 13 2011
NEW YORK
COUNTY CLERK'S OFFICE

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, defendants Bleu Evolution Bar & Restaurant Corp. s/h/a Bleu Evolution Bar & Restaurant Corp. and 593 Fort Washington L.L.C. ("Bleu Evolution") move for summary judgment dismissing the complaint.

On September 28, 2006, plaintiff Julia Schwartz ("Schwartz") tripped and fell on the sidewalk outside of Bleu Evolution Bar & Restaurant located at 808 West 187th Street. She commenced this action by summons and complaint dated November 16, 2006, seeking

to recover damages for the injuries she sustained as a result of her fall. She alleged that Bleu Evolution was negligent and violated Administrative Code 7-210.

Bleu Evolution now moves for summary judgment dismissing the complaint, arguing that (1) it did not breach any duty owed under Administrative Code 7-210 because the accident did not occur on the sidewalk adjacent to property it owned; (2) any defect that existed was trivial and not actionable; and (3) it did not create or have notice of any defect.

In support of its motion, Bleu Evolution refers to the examination before trial testimony of the managing agent for the subject building Stanley Vickers ("Vickers"), Bleu Evolution Restaurant's manager Julio Gonzalez ("Gonzalez"), and Schwartz.

Schwartz testified that the accident occurred on the sidewalk "right to the side of the Bleu Evolution Restaurant. At the very end of it." She explained that she fell when her left foot became caught on an overhang between flagstones. She identified the location of her fall on photographs.

Upon examination of those photographs, Vickers testified that Schwartz's accident did not occur on the sidewalk adjacent to Bleu Evolution's property. Rather, her fall occurred on the sidewalk adjacent to the cleaners located next door to Bleu Evolution. He explained that Bleu Evolution's leasehold ended to the left of the defect marked by Schwartz. Vickers further testified that he was unaware of any repairs undertaken by the building owner or managing agent to the sidewalk at any time or requests by the tenant for

such repairs. He also indicated that his office never received any complaints about the sidewalk prior to the accident and was not aware of any prior accidents in the location.

Gonzalez testified that he never noticed an unsafe condition on the sidewalk outside of the restaurant, never received any complaints about the sidewalk, and was not aware of any prior accidents in the location. He further explained that the property line between the restaurant and the cleaners next door was demarcated by the gap between the two buildings. He estimated the gap to be an inch wide.

In opposition, Schwartz argues that issues of fact exist as to whether she tripped and fell on the sidewalk adjacent to property owned by Bleu Evolution. Specifically, Schwartz maintains that no evidence or expert testimony has been presented to establish the property line and/or boundaries between Bleu Evolution and the cleaners located next door. Schwartz further argues that issues of fact exist as to whether the defect upon which Schwartz tripped and fell was trivial, and whether Bleu Evolution had constructive notice of the defect.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must

then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

Here, Bleu Evolution argues that the accident did not occur on the sidewalk adjacent to its property, rather, it occurred on the sidewalk adjacent to the cleaners' property next door. However, Bleu Evolution has failed to meet its burden of establishing entitlement to judgment as a matter of law as it has submitted no expert testimony or other evidence to establish the property line and boundaries between Bleu Evolution and the cleaners located next door. No basis has been offered for Vickers' and Gonzalez's opinions that the sidewalk upon which Schwartz tripped and fell was adjacent to property not owned by Bleu Evolution.

Further, generally the issue of whether a dangerous or defective condition exists or whether a defect is too trivial to be actionable depends on the particular facts of each case and is properly a question of fact for the jury. *See Trincere v. County of Suffolk*, 90 N.Y.2d 976 (1997). Here, no expert or other evidence has been presented by any party to explain the nature of the defect, specifically, its characteristics or dimensions. Therefore, issues of fact as to whether the defect was trivial in nature and whether Bleu Evolution had

constructive notice of the defect remain for the jury to resolve. *See generally Jacobsen v. Krumholz*, 41 A.D.3d 128 (1st Dept. 2007).

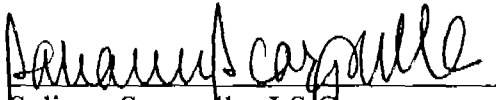
In accordance with the foregoing, it is

ORDERED that the motion for summary judgment by defendants Bleu Evolution Bar & Restaurant Corp. s/h/a Bleu Evolution Bar & Restaurant Corp. and 593 Fort Washington L.L.C. is denied.

This constitutes the decision and order of the Court.

Dated: New York, New York
April 11, 2011

ENTER:


Saliann Scarpulla, J.S.C.

FILED

APR 13 2011

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