Pivawer v Nicotra 1100, LLC

2007 NY Slip Op 30236(U)

March 14, 2007

Supreme Court, Richmond County

Docket Number: 0102430

Judge: Joseph J. Maltese

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SUPREME COURT OF THE STATE OF NEW YORK **Index No.: 102430/2005**
COUNTY OF RICHMOND **PART DCM 3** **Motion No.: 1**

PAULETTE PIVAWER and PAUL PIVAWER,

DECISION & ORDER
HON. JOSEPH J. MALTESE
Plaintiffs

against

NICOTRA 1100, LLC, and HILTON HOTELS CORPORATION,

Defendants

The following items were considered in the review of this motion for summary judgment

Papers	Numbered
Notice of Motion and Affidavits Annexed	**1**
Answering Affidavits	**2**
Replying Papers	**3**
Exhibits	**Attached to Papers**
Memorandum of Law	

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendants, Nicotra 1000, LLC and Hilton Hotels Corporation [hereinafter "Hilton"], move this court for an order pursuant to CPLR § 3212 dismissing the plaintiffs' complaint. The plaintiffs oppose.

This action was brought to recover damages for the personal injuries allegedly sustained on May 22, 2004 while attending a graduation party at the Hilton. Plaintiff alleges that she tripped and fell when her heel was caught in a gap between the parquet tiles of the dance floor in the "Persimmon Room." At her deposition, Paulette Pivawer testified that she arrived at approximately noon for the afternoon party and noticed two or three gaps randomly throughout the dance floor as large as 1" wide by 1" long. She also testified that she did not notify any of Hilton's employees of the gaps. She further testified that she did not believe that she fell because of the gaps that she noticed when she first arrived at the Hilton.

The plaintiff then testified that towards the end of the party, as she was walking diagonally across the dance floor, her left heel got caught in a gap and was thrown into the air, causing her to fall. She stated that she did not feel that the dance floor was loose or slippery and did not notice any food, liquid or debris in the area where she fell. She testified that she was wearing a wedge pump that had a 1" tall by 1" wide heel. It is plaintiff's allegation that her left heel got caught in an alleged gap in the dance floor, which was a few feet towards the center of the dance floor and away from the edge of the dance floor where she landed, of which she also claims the Hilton had notice of.

The defendants, in moving for summary judgment, rely upon the deposition testimony of Jeffrey Roach, the Banquet Manager at the Hilton in the Persimmon Room, at the time of the accident. Mr. Roach testified that he witnessed the plaintiff fall. Specifically, he testified that he saw Ms. Pivawer walking across the dance floor at a normal pace "and then she tripped on her own feet and fell down face first." He stated that she stumbled and tripped on her own feet, which he believed caused her to fall. He testified that he did not see anything that could have caused her to stumble, nor did he see a gap in the tiles or a separation in the dance floor.

Immediately following the accident, Mr. Roach testified that he ran over to assist the plaintiff and noticed that she was wearing a dark colored "wedged heel shoe." No one, including the plaintiff, made a statement regarding the cause of the accident. He then stated that he inspected the general area, approximately 6' to 8' around the area where the plaintiff fell and noticed nothing out of the ordinary. Specifically, he stated that he did not notice any separation of the dance floor tiles after the accident. Furthermore, he testified that he had not received any complaints about the condition of the dance floor or separation of tiles within one month prior to the accident, and that he made a visual inspection of the dance floor prior to the commencement of the party and observed nothing wrong with the dance floor.

The defendants also submit the affidavit of Carroll Tavella, Vice President of the Hilton Garden Inn, and the Manager on Duty on the date of the accident. She testified that Mr. Roach came to her office to apprise her of the accident and she accompanied him to the Persimmon Room. She stated that she personally inspected the dance floor and did not observe any problems, that the floor was connected and in no way out of place and that there were no liquids or other substances on the floor. She also stated that she observed the plaintiff sitting in a chair on the side of the dance floor. Ms. Tavella testified that she noticed that the plaintiff was wearing shoes with a 4" wedged heel which reminded her of the type of shoes that teenagers wear. Ms. Tavella also testified that, after reviewing the photographs of the Shoe Inspection performed on October 30, 2006, she stated that the shoes depicted in the photographs were not the shoes the plaintiff was wearing in the Persimmon Room at the Hilton on May 22, 2004.

In opposition, the plaintiff relies upon the deposition of Paulette Pivawer and Paul Pivawer, as well as his supplemental Affidavit. Mr. Pivawer testified that after his wife's fall, he looked at the dance floor and saw his wife's shoe stuck in the gap of the floor. He stated that the gap in which his wife's shoe became stuck was near the table at which they were sitting throughout the party, and that his wife was wearing a one inch heeled shoe on the day of the accident.

On a motion for summary judgment, the function of the court is issue finding, and not issue determination (*Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff'd* 65 NY2d 732 [1985]). In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion (*Glennon v. Mayo,* 148 AD2d 580 [2d Dept 1989]). motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion" (*Marine Midland Bank, N.A., v. Dino,* et al., 168 AD2d 610 [2d Dept 1990]). Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable (*American Home Assurance Co., v. Amerford International Corp,* 200 AD2d 472 [1st Dept 1994]). As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law. (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003]).

Here, there is an issue of fact regarding the type of shoe the plaintiff was wearing at the time of the accident. According to both plaintiffs, Paulette Pivawer was wearing a one inch heeled shoe on the date of the accident which was depicted during a shoe inspection conducted October 30, 2006. Hilton, through the testimony of Ms. Tavella, as well as the accident reports generated in response to the accident, state that the plaintiff, Paulette Pivawer, was wearing a 4" wedged heel. Accordingly, summary judgment is not appropriate in this action.

Accordingly, it is hereby:

ORDERED, that the defendants' motion for summary judgment is denied; and it is further

ORDERED, that all parties return to DCM 3 at 9:30 on **April 16, 2007** for a pre-trial conference.

ENTER,

DATED: March 14, 2007

Joseph J. Maltese
Justice of the Supreme Court