SHORT FORM ORDER

INDEX No. 05-4127
CAL. No. 06-02971-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 5-25-07
ADJ. DATE 8-3-07
Mot. Seq. # 002 - MD

MARY PAVLOVICH and MIRKO PAVLOVICH, Plaintiffs, - against - IBM RESTAURANTS, INC. d/b/a TELLO RESTAURANTS, Defendant.	SIBEN & FERBER Attorneys for Plaintiffs 1455 Veterans Memorial Highway Hauppauge, New York 11749 FUREY, KERLEY, WALSH, et al. Attorneys for Defendant 2174 Jackson Avenue Seaford, New York 11783

Upon the following papers numbered 1 to 29 read on this motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; Notice of Cross Motion and supporting papers__; Answering Affidavits and supporting papers 16-27; Replying Affidavits and supporting papers 28-29; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (002) by defendant IBM Restaurants, Inc. d/b/a Tello Restaurant pursuant to CPLR 3212 summary judgment is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, Mary Pavelich, on October 30, 2004 when she fell at the Tello Restaurant in Huntington, New York. Defendant seeks summary judgment on the basis that it bears no liability for plaintiff's accident. In support of this application, defendant has submitted, inter alia, a copy of the pleadings and the bill of particulars, copies of the transcripts of the deposition testimony given by the parties and the affidavit of defendant's expert, Anthony Mellusi.

"To prove a prima facie case of negligence, the plaintiff must establish the existence of a duty on the defendant's part to the plaintiff, the breach of the duty, and that the breach of the duty was a proximate cause of an injury to the plaintiff. Absent a duty of care, there can be no breach and no liability. Although the court, as a threshold matter, must decide whether one party owes a duty of care to another where the facts are undisputed, and but one inference may be drawn, the question of duty is not for the court as a matter of law where the facts are disputed (***Gordon v Muchnick,*** 180 AD2d 715, 579 NYS2d 745 [2nd Dept 1992]).

Plaintiff testified at her examination before trial that she went to Tello's Restaurant with her husband, Mirko Pavlovich, on October 30, 2004, looking for a place to have her daughter's baby shower. She walked though the front door into the piano/bar area of the restaurant and asked if she could speak to the manager. A man named Roger then came to speak with her and gave her a party plan menu package. They stayed in the bar area having a discussion, then walked into a hall which was about twelve feet long to see the two party rooms. Roger walked in front of her and they came upon the main dining room. She walked in and became airborne and fell to the floor. She stated she did not slip. There was a step into the dining room that she did not observe. She had never been to the restaurant before. She said the restaurant was dark, dimly lit. She did not see a sign or handrails, but did observe a railing as she was being removed from the restaurant. She was wearing flat, rubber soled shoes. She was wearing prescription glasses at the time of the incident.

Mirko Pavlovich testified that he was with his wife at the time of the incident, and described the lighting conditions a bar-like, poor, somewhat dimly lit. When he left the bar area, he walked down the hallway, which he described as having dark paneling, somewhat behind and to the right of his wife. At the end of the hallway, they made a right and the dining room entrance was there. They were looking ahead at the dining room when his wife made a stepping motion into the dining room and suddenly, she was on the floor. The manager was standing in the hallway to the left of his wife when this occurred. Mr. Pavlovich stated he did not see a step when he was there and did not see any sign warning of a step.

Roger Bedoian testified he is the president of IBM Restaurant Corporation which owned the Tello Restaurant in Huntington in October, 2004. He did not own the building where the restaurant was located and occupied it pursuant to a twenty five year lease. Their catering business was located upstairs. The first floor contained the restaurant and bar. The main dining room, located directly behind the bar area, was separated by a wall from the back dining room. The hallway and the bar area have the same tile floor. The hallway extends from the bar area to the side dining room. The main dining room is to the right off that hallway. There is a two inch difference in the height of the flooring between the hallway and the main dining room. There are no lights above or below the step, but he described the entryway as being illuminated. He stated there was a sign above the archway entrance to the main dining room that states "Watch your step." At the time of this incident, which occurred about 12:45 p.m., there were five guests in the dining room as the main dining room and bar were open. He first met plaintiffs in the bar area for a limited time as he was pressed for time that day and had to be at the bank by 1:00 p.m. He believes he gave them a catering menu and then showed them the side dining room and then the main dining room. He said it was more than likely that he walked ahead. He did not recall if they walked into the main dining room. He thinks he may

have said that this is the main dining room and the seating capacity when they reached the room. He testified that because a wall separates the rooms, you have to look into the room, so Ms. Pavolich leaned over and fell into the room. He did not see her step forward. He further testified she fell over losing her footing and she planted her legs after she fell but her legs couldn't sustain her weight, so at that point she crumbled and fell over. He said, "I guess she was an overweight woman." He stated there was a handrail to the left side, and there is a brick wall on the right. When she fell, he said she fell face down and said "I can't believe how clumsy I am," and was quite repetitive with it. He later saw the other customers who were there at the time of the accident, and said they probably said something about the accident but he could not remember if they told him they saw what happened. He was not aware of any prior complaints about the difference in elevation between the tile floor and the wood floor at the entrance to the main dining room.

Defendant has also submitted the affidavit of Anthony Mellusi, a federally licensed engineer who states he was retained as an expert on behalf of Tello Restaurant to investigate and inspect the premises where plaintiff's accident occurred. In preparing his report, he reviewed the deposition transcripts, plaintiff's bill of particulars, and color copy photos of Tello Restaurant. He states that the restaurant has been renovated and the area where the accident occurred no longer exists. He concludes there is no building violation that is causally related to plaintiff's alleged injuries, the lighting was proper and adequate as the photographs show recess lighting at and near the entrance from the hallway into the main dining room, and the emergency exit door is glass which provides substantial and ample natural sunlight on the area. He states there is a gold handrail in the entrance way to the main dining area and stark contrast in the construction material used for the hallway and flooring of the main dining room. It is Mr. Mellusi's expert opinion that there was no violation made by defendant relating to plaintiff's alleged injuries.

Based upon the foregoing, it is determined defendant has not established prima facie entitlement to summary judgment on the issue of liability due to the existence of factual issues.

Although defendant presented the affidavit of Anthony Mellusi, a federally licensed engineer, the Court concludes that affidavit's content is conclusory at best. Mr. Mellusi did not physically inspect the premises where the accident occurred. He does not comment on lighting measurements or intensity of the light at the time of the accident. It is not known whether or not the lights were on at the time of the accident, or whether there were dimmer controls being utilized on the light switches. He does not comment on the distance of the closest light to the step or the amount of lighting at the step itself. Although he comments that there is stark contrast in the flooring construction materials used in the hallway and main dining room, he does not state whether or not the step into the dining room from the hallway is visible or apparent. He makes no opinion based upon any reasonable degree of certainty in his area of expertise.

Recovery has been allowed for falls caused by step-downs or changes in floor level and the findings of liability have typically turned on factors such as inadequate warning of the drop coupled with poor lighting, inadequate demarcation between raised and lowered areas, or some other distraction or similar dangerous condition (*see,* ***Schreiber v Philip & Morris Restaurant Corp.,*** 25 AD2d 262, 268 NYS2d 510 [1st Dept 1966]). In the instant action, defendant's own submissions have raised factual issues. Plaintiff testified the restaurant was dimly lit. Roger Bedoian testified

there were no lights above or below the step. Thus there are factual issues concerning whether or not the step area was adequately lit at the time of the accident, whether the step was open and obvious, and whether there were adequate warnings of the step (***Cupo v Karfunkel,*** 1AD3d 48, 767 NYS2d 40 [2nd Dept 2003]; ***Tiriro v Westland South Shore Mall,*** 291 AD2d 489, 739 NYS2d 393 [2nd Dept 2002] citing ***Chafoulias v 240 E. 55th Tenants Corp.,*** 141 AD2d 207, 533 NYS2d 440 [1st Dept 1988]). Although Mr. Bedoian testified there was a sign above the curved arch into the dining room that warned "Watch your step" there are factual issues concerning whether this sign was apparent and visible and whether it adequately warned of the depression or step down. Whether or not the step should have been seen by plaintiff is a question of fact (***Murphy v Board of Education of the City of Utica,*** 20 AD2d 53, 244 NYS2d 986 [4th Dept 1963]).

Landowners, who have or should have reason to expect that persons will find it necessary to encounter [an] obvious danger, owe a duty of reasonable care to either warn such persons of the danger or to take reasonable steps to protect them from it (***Paynter v Moorehouse,*** 270 AD2d 708, 704 NYS2d 718 [3rd Dept 2000]). A landowner must act as a reasonable man in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury and the burden of avoiding the risk (***Basso v Miller,*** 40 NY2d 233, 386 NYS2d 564 [1976]). Mr. Bedoian testified he was in a hurry to go to the bank, and plaintiff testified she had never been to the restaurant before. There are therefore factual issues concerning whether Mr. Bedoian exercised reasonable care under the circumstances to warn plaintiff of the step since he was aware of the potential danger as evidenced by the placement of the sign and handrail.

Accordingly, defendant's motion for summary judgment is denied.

Dated: SEP 13 2007

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**