Vaughan v Second Ave. Sandwich, LLC

2007 NY Slip Op 32955(U)

September 14, 2007

Supreme Court, Kings County

Docket Number: 0018228/2005

Judge: Michael Ambrosio

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At an IAS Civil Term Part 31, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on September 14, 2007.

PRESENT: **HONORABLE MICHAEL A. AMBROSIO**

NEIL VAUGHAN,

PLAINTIFF,

- AGAINST -

SECOND AVENUE SANDWICH, LLC D/B/A SUBWAY, RADIO SHACK, MANHATTAN NEWS CAFÉ, LLC, BOWLING GREEN ASSOCIATES, LP AND MOSES MARX,,

DEFENDANT.

INDEX NO.: 18228-2005

DECISION AND ORDER

Defendants, Second Avenue Sandwich, LLC d/b/a Subway ("Subway"), Radio Shack, Manhattan News Café, LLC ("Café"), Bowling Green Associates, LP ("Bowling Green") and Moses Marx, move for summary judgment pursuant to CPLR 3212. Plaintiff, Neil Vaughan ("Vaughan") opposes the instant motions.

Vaughan claims that on November 2, 2004 he slipped and fell on tuna fish on the landing of an interior stairway leading to the entrances of Subway and Radio Shack. Vaughan testified at his examination before trial that on the day of the accident he went to Subway to purchase a sandwich during his lunch break from work. Upon arriving to the premises he noticed that Café had a small table with cups of tuna as samples on the sidewalk in close proximity to a set of exterior stairs leading to Subway and Radio Shack. Nobody from Café was by the table and there were no trash receptacles near the food samples. As Vaughan ascended the stairway to enter Subway he noticed tuna fish and cups of tuna on the steps and on the ledge. He estimated there were three or four cups to his left and to his right and also splatters of tuna on the steps. He ascended toward the middle of the staircase to avoid the tuna and saw no tuna cups or tuna on the top landing adjacent to Subway. When he exited Subway approximately ten to fifteen minutes later, he slipped on tuna that was on the top landing near the first step.

According to Vaughan, Café had engaged in the practice of leaving food samples out on the sidewalk for months. He also previously noticed no waste basket near the table and discarded food debris on the sidewalk and the stairway. In Vaughan's affidavit in opposition to defendant's summary judgment motion, he stated that in the six to eight months prior to his accident he saw on ten to fourteen occasions debris from Cafe's food sample table strewn around the staircase leading to Subway and Radio Shack. Vaughan also provided portions of the examination before trial of Yefrim Shteynfeld, a co-worker who testified that he also previously noticed "*a lot*" of remnants from the food samples on the steps leading to Subway and Radio Shack. He testified that there were "*leftovers all over the place because there was no wastebasket.*"

Jonathan Feld, the owner of Subway testified at his EBT that he was also aware of Cafe's practice of providing food samples on the sidewalk and on several occasions had complained to the owner and employees of Café about the debris all over the sidewalk and stairway leading to his store. Feld testified that he had previously seen food on the steps from the samples but noticed no trash can near the samples on several occasions. According to Feld, this practice was a "*source of contention*" between him and Café. He objected to the practice out of concern for the "*hazzard*" the debris posed (EBT, p. 39). Feld further testified that his employees would clean the stairway in front of his restaurant from time to time but never saw any Radio Shack employees cleaning the stairway. Feld also testified that he never complained to Bowling Green, the owner of the building about the debris.

Mendy Braun, an employee of Braun Management, the management company hired by Bowling Green to oversee the building testified that the building had a staff of five employees responsible for maintenance of the building. They had a "*shop*" within the building and would, among other things, clean during the course of the business day. Braun also utilized the services of

Perfect Building Maintenance, a cleaning company that cleaned all the commercial office spaces and the sidewalk in front of the building. Jose Gill, one of Bowling Green's employees would also cleaned the stairs "*if he saw debris*" (EBT, p. 54). Braun testified that the staircase leading to Subway and Radio Shack was not an area they would clean and didn't know whose responsibility it was to clean and maintain the staircase (EBT, p. 36). Braun also claims nobody ever complained to her about debris on the staircase from Café's food display.

Rashad Aplkerov, the owner of Café testified at his examination before trial that Café was in the practice of putting out food samples in cups on the sidewalk in front of his store. According to Aplkerov, he always had an employee by the food samples as well as a trash bucket near the table. His employee would clean up any debris immediately. Aplkerov also claimed he never used tuna for samples or that Feld complained to him about the food samples. Aplkerov further testified that he never saw anyone from Subway or Radio Shack cleaning the stairway but had seen Bowling Green employees cleaning "*the whole street*" (EBT, p.31).

To prove a prima facie case of negligence in a slip and fall case, a plaintiff is required to show that defendant created the condition which caused the accident or that defendant had actual or constructive notice of the condition (Scott v Beverly Hill Furniture, 30 AD3d 557 [2nd Dept., 2006]). Plaintiff may establish a prima facie case of negligence based wholly on circumstantial evidence as long as he/she demonstrates the existence of facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred (Affenito v PJC 90th Street LLC, 5 AD3d 243 [1st Dept., 2004]).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material

issues of fact from the case (Winegrad v New York Univ. Med. Center, 64 NY2d 851). A failure to do so requires denial of the motion regardless of the sufficiency of the opposing papers (Id.).

As applicable here, it is defendants' burden to demonstrate by evidentiary proof that they neither created the dangerous condition or had actual or constructive notice of the unsafe condition (Colt v Great Atlantic & Pacific Ter. Co. Inc., 209 AD2d 294 [1st Dept., 1994]). None of the defendants have met their burden.

The unsafe condition was not an isolated incident but a recurring situation. "C*onstructive notice may be demonstrated by evidence of a recurring dangerous condition in the area of the accident that was routinely left unaddressed by the defendant[s]*" (see, Medzelewska v NYC, 31 AD3d 314 [1st Dept, 2006]; Goldblatt v Fairway Supermarket, 268 AD2d 248 [1st Dept, 2000]; Zanki v Cahill, 2 AD3d 197 [1st Dept, 2003]; Weisenthal v Pickman, 153 AD2d 849 [2nd Dept, 1989]).

With respect to Café, there is a question of fact as to whether it created the unsafe condition. By distributing food samples on the sidewalk adjacent to their store and the stairway to Subway and Radio Shack it was reasonable to assume that samples might be dropped on the ground near the table and Café had a duty to exercise due care to protect individuals in the general vicinity from such a condition (see, Burke v Wegman's Food Markets, Inc., 1 Misc2d 130). According to the deposition testimony of Vaughan, Shteynfeld and Feld, Café failed to provide receptacles or other means for proper disposal of the samples and as a result, on numerous occasions the area of the stairway to Radio Shack and Subway was littered with their food samples creating a clear and obvious danger to those traversing those steps. Indeed, according to Feld, he complained about the unsafe condition to Aplkerov, Cafe's owner. Aplkerov denied Feld ever complained to him or that he ever put out tuna samples. Clearly, there is an issue of fact whether Café created the unsafe condition.

With respect to Bowling Green, the owner, it claims that as a out-of possession landlord it had no contractual duty or otherwise to clean and maintain the stairway leading to Subway. Bowling Green relies on those provisions in their leases with Subway and Radio Shack which Bowling Green maintains required Subway and Radio Shack to clean and maintain the stairway where plaintiff fell. The leases, however, do not require Subway or Radio Shack to clean and maintain the stairway. Article 30 of the respective leases stated, in relevant part:

> "*Tenant shall at tenant's expense, keep demised premises clean and in order, to the satisfaction to (sic) owner, and if demised premises are situated on the street level floor, tenant shall, at tenants own expense . . . keep said sidewalk curbs free from snow ice, dirt and rubbish . . .*"

The floor schematics attached as a riders to the leases define the "*demised premises*" for Subway and Radio Shack, respectively. In those diagrams it is clear that the common stairway leading to both stores are not part of the "*demised premises*." That being the case, the owner had a non-delegable duty to maintain and clean that stairway. "*[W]henever the general public is invited into stores, office buildings, and other places of public assembly*" it is entitled to a safe and reasonable means of entry and exit from the premises. Thus owners are charged with a non-delegable duty to provide members of the general public with a reasonably safe premises including a safe mean of ingress and egress (see, Backiel v Citibank, 299 AD2d 504[2nd Dept., 2002]). It also cannot be said as a matter of law that Bowling Green did not have actual or constructive notice of the recurring dangerous condition since they maintained a full time cleaning crew who routinely cleaned the sidewalk in front of the stairway leading to Subway and Radio.

With respect to Subway and Radio Shack, it is well established that the owner or operator of a store must take reasonable care that its customers shall not be exposed to danger of injury

through conditions in the store or at the entrance which it invites the public to use (see, Gullo-Georgio v Dunkin Donuts Inc., 38 AD3d 836 [2nd Dept., 2007]). Viewed in the light most favorable to the plaintiff, the recurring debris from the food samples on the stairway leading to Subway and Radio Shack was a condition which posed a danger to its customers at the entrance to their stores. Subway clearly had notice of that condition. Feld, the owner of Subway, testified that he was aware of the "*hazardous*" condition because he complained to Cafe's owner and employees on more than one occasion. Yet he failed to complain to Bowling Green, the owner who had the duty to maintain and clean the entrance stairway leading to his store. Radio Shack employees clearly traversed those stairs on a daily basis and therefore it should have also noticed the recurring dangerous condition. In the end, defendants' negligence may be inferred by failing to devise or implement a proper plan to clean the food sample debris from the stairway to avoid the creation of a dangerous condition on the stairway to its customers.

Finally, the defendants' respective motions for contractual and or common law indemnification are denied as premature until the trier of fact sorts out liability among the four named defendants.

Accordingly, defendants' motions for summary judgment are denied in their entirety.

This constitutes the Decision and Order of the Court.

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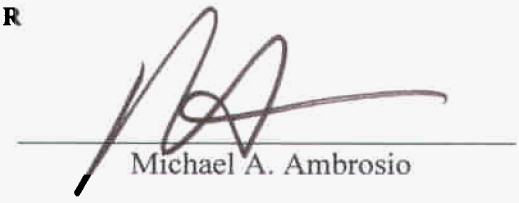

Michael A. Ambrosio