

Sutton v Beer Garden, Inc.

2007 NY Slip Op 33189(U)

October 2, 2007

Supreme Court, New York County

Docket Number: 0116285/2003

Judge: Carol R. Edmead

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Donald Sutton

INDEX NO. 116285/03

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

- v -

The BEER Garden, Inc. and the Roxy.

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

FILED

OCT 05 2007

NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendant pursuant to CPLR 3212 for summary judgment dismissing plaintiff's Complaint is granted solely to the extent that plaintiff's claim that the steps were wet, slippery, and otherwise defective is dismissed, and denied as to plaintiff's inadequate lighting and inadequate handrail claims; and it is further

ORDERED that defendant serve a copy of this order and memorandum opinion with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 10/2/07

[Signature]
J.S.C.

HON. CAROL EDMEAD
 NON-FINAL DISPOSITION

Check one: FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
DONALD SUTTON,

Plaintiff,

-against-

THE BEER GARDEN, INC. and THE ROXY,

Defendants.

-----X
HON. CAROL ROBINSON EDMEAD, J.S.C.

Index No. 116285-2003

DECISION/ORDER

FILED
OCT 05 2007
NEW YORK
COUNTY CLERK'S OFFICE

MEMORANDUM DECISION

Donald Sutton ("plaintiff") commenced this action for damages he allegedly sustained when he slipped and fell inside The Roxy, a Manhattan nightclub owned by defendant, The Beer Garden, Inc. d/b/a The Roxy s/h/a The Beer Garden, Inc. and The Roxy (collectively, the "defendant"). Defendant now moves pursuant to CPLR §3212 for summary judgment dismissing plaintiff's complaint.

According to plaintiff's deposition testimony, the occurrence took place on November 22, 2005 while he was coming down the steps from the DJ's booth inside The Roxy. Plaintiff stated that this was the first time that evening that he had been on those stairs. Plaintiff had been on the landing on top of the step for 10 to 15 minutes before he proceeded back down the steps. Although the area around the steps was "dark," he was able to see the steps. The steps were carpeted. Plaintiff did not notice any "spilled liquids" on the steps or any ice cubes on the steps when he ascended the stairs. As he descended the stairs, plaintiff's left foot "slipped" and "got caught," and his knee snapped. According to plaintiff, the "rubber on the edge of the step" "wet[ness] or the rug or the rubber" caused his foot to get caught. Yet, later at his deposition,

plaintiff testified that he did not know what caused his foot to slip.

According to the deposition testimony of Morgan McLean, the night manager at The Roxy at the time of the occurrence, between 5 to 7 porters and busboys were working at the premises on the night of the occurrence. Their jobs included removing liquid spills from surfaces. Mr. McLean described the lighting conditions in the common areas of The Roxy as “nightclub lighting, similar to theatrical lighting.” Approximately 15 feet above the subject steps were “Parcons,” hanging ceiling light fixtures. He described the “theater light” as a “bright light with color gel over it” which “spreads a wide beam of light, generally covered red.” Further, Mr. McLean stated that a white “duct tape” strip ran “over a metal - the topside or the walking side of the step over a small metal strip that covers the carpet.” The purpose of the white duct tape was to “assist with seeing the steps. It illuminates when the red or any light is shined on it, makes it very bright.” Based on a photograph presented to him at the deposition, Mr. McLean testified that there were metal railing or banisters “on both ends” of the steps.

As the manager of The Roxy, Mr. McLean would walk through the club periodically, approximately every half hour on the perimeter and raised areas. If he saw any lights out, spills or debris, he would notify one of the busboys by radio, who, along with staff, would come and clean the area.

Based in large part on the deposition testimony of the parties, defendant argues that it is entitled to summary judgment dismissing the Complaint. Defendant contends that plaintiff “blames his trip and fall on” (1) a wet and slippery step, (2) inadequate lighting, (3) inadequate handrails, and (4) a “trap-like” condition on the subject step, which is not alleged in plaintiff’s bill of particulars. Defendant argues that since there is no evidence establishing that defendant

had actual or constructive notice of any of the conditions that allegedly caused plaintiff to slip and fall, and no expert witness opining that the subject stairs lacked adequate lighting and/or handrails, dismissal of the Complaint is warranted.

In opposition, plaintiff argues that defendant failed to meet its burden as the movant for summary judgment. Plaintiff argues that on the issue of inadequate lighting, defendant merely submits testimony that there was a single theater lighting fixture some 15 feet above the stairway, without any evidence that this fixture satisfied NYC Building Code §§ 27-540(a) and 27-375(f)(1). Conclusory statements by defendant's employee regarding the adequacy of lighting conditions are insufficient to support summary judgment. Further, evidence that the lighting in the area of the fall was defective or inoperable for three hours before plaintiff's accident, or that a light switch was not properly installed within the reach of plaintiff traversing the darkened stairway, raises a question of fact as to whether the defendant created or had notice of the inadequate lighting condition.

Also, evidence that a stairway lacked one or more statutorily mandated handrails raises an issue as to whether the alleged missing banister was a proximate cause of plaintiff's injuries. Plaintiff testified that there were no banisters whatsoever along the stairs, and that when he fell, he reached out in an attempt to prevent his fall and actually hit the wall. Further, although defendant's witness, Mr. McLean, testified that there were handrails on either side of the stairwell, he never stated that there was a rail in the center of this eight to a ten-foot wide stairway, as required by NYC Building Code §27-375(f)(1).

In reply, defendant contends that plaintiff's inadequate lighting and handrail claims are unsupported by any expert affidavit as required to maintain such claims. Also, defendant

contends that plaintiff's argument that defendant bears the burden to prove that the lighting and handrails were adequate is erroneous, as it remains the plaintiff's burden to prove that the lighting and/or handrails were inadequate and causally related to his accident. Further, the First Department recently rejected a plaintiff's claim that an area was "dark" or "dim" under similar circumstances, on the ground that cocktail lounges are expected to be dimly rather than brightly lit. And, unlike the plaintiff herein, in the cases cited by plaintiff in opposition to defendant's motion, expert affidavits were submitted to support the inadequate lighting or handrail claims.

Analysis

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390 [Sup Ct New York County, Oct. 21, 2003]). The motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212[b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman v City of New York*, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]). Further, the moving party must demonstrate entitlement to judgment as a matter of law (*Zuckerman, supra*; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498, 144 NE2d 387), and the failure to make such a showing will result in the denial of the motion, regardless of the sufficiency of the opposing

papers (*Pappalardo v New York Health & Racquet Club*, 279 AD2d 134, 718 NYS2d 287 [1st Dept 2000] citing *Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982, 985, 599 NYS2d 526, 615 NE2d 1010; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, *supra*).

Once the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (CPLR §3212[b]; *Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York*, *supra*, at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). The party opposing the motion must set forth evidentiary proof in admissible form and “lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist” and “the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief” (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd.*, 62 NY2d 686 [1984]; *see also Zuckerman*, *supra* at 562).

A landowner has a duty to maintain its property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to third parties, the potential seriousness of the injury and the burden of avoiding the risk (*Branham v Loews Orpheum Cinemas, Inc.*, 31 AD3d 319, 322 [1st Dept 2006] *affd.*, 8 NY3d 931 [2007], citing *Kellman v 45 Tiemann Assoc.*, 87 NY2d 871, 872 [1995]; *Basso v Miller*, 40 NY2d 233, 241 [1976]).

In order for a landlord to be held liable for injuries resulting from a defective condition upon its premises, the plaintiff must establish that the landlord created or had actual or constructive notice of the hazardous condition (*Frank v Time Equities, Inc.*, 292 AD2d 186 [1st

Dept 2002]; *Segretti v Shorenstein Co., East. L.P.*, 256 AD2d 234 [1st Dept 1998]). To constitute constructive notice, a dangerous condition must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy the condition (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *Budd v Gotham House Owners Corp.*, 17 AD3d 122, 793 NYS2d 340 [1st Dept 2005]; *Gutierrez v Lenox Hill Neighborhood House, Inc.*, 4 AD3d 138, 771 NYS2d 513 [1st Dept 2004]; *Lemonda v Sutton*, 268 AD2d 383, 702 NYS2d 275 [1st Dept 2000]; *Segretti*, 256 AD2d 234, *supra*). A defendant/property owner may also have constructive notice of a dangerous condition if the plaintiff presents evidence that the condition was ongoing and recurring in the area of the accident, and such condition was left unaddressed (*see Gordon v American Museum of Natural History*, 67 NY2d 836, *supra*; *Segretti*, 256 AD2d 234, *supra*; *see also O'Connor-Miele v Barhite & Holzinger, Inc.*, 234 AD2d 106, 650 NYS2d 717 [1st Dept 1996]). A defendant's burden on the issue of notice on a motion for summary judgment is satisfied if defendant demonstrates the absence of a material issue of fact on the question (*Strowman v Great Atl. & Pac. Tea Co.*, 252 AD2d 384, 675 NYS2d 82 [1st Dept 1998]).

Defendant's submission of the deposition testimony of the plaintiff and defendant's manager sufficiently establishes that it did not have actual or constructive notice of the alleged wet condition of the subject steps.

Plaintiff testified that he did not notice any spilled liquids or ice on the steps while ascending the stairs (Plaintiff's EBT, page 38). Plaintiff remained on the landing atop of the stairs for 10-15 minutes before descending the stairs. (Plaintiff's EBT, pages 34-35). After his fall, he did not look at the step to see what caused him to fall (Plaintiff's EBT, pages 41-42).

Plaintiff testified that before his accident, he observed patrons who were sitting on the steps spill drinks on the steps “two or three times,” and that he never saw any staff members clean up the steps (Plaintiff’s EBT, page 42-43). However, when asked whether he could state the last time he saw someone spill a drink on the steps, he responded “No.” Arguably, patrons could have spilled their drinks on the steps minutes or seconds before plaintiff’s accident, or while he was on the landing, and any other conclusion would be pure speculation (*see Gordon v American Museum of Natural History*, 67 NY2d 836, *supra*). Thus, there is no any evidence indicating that (1) the purported wet condition of the steps was “visible and apparent” for a “sufficient length of time” to permit defendant to discover and remedy it,” or (2) such condition was ongoing and recurring and left unaddressed by defendant. At best, plaintiff’s observation of patrons spilling drinks may give rise to a general awareness of a wet condition, which is legally insufficient to establish constructive notice (*see Segretti v Shorestein Co., East., L.P.*, 256 AD2d 234, *supra*; *Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 622 NYS2d 493 [1994] [“mere general awareness of the presence of some dangerous condition is legally insufficient to establish constructive notice]; *see also Gordon v American Museum of Natural History*, 67 NY2d 836, *supra*; *Segretti*, 256 AD2d 234, *supra*).

Thus, given the lack of any evidence that defendant had actual notice of the complained-of condition, or any evidence that the condition was visible and apparent for a sufficient time for defendant to discover and remedy it, defendant fulfilled its initial burden of establishing its right to summary judgment (*see Frank v Time Equities, Inc.*, 292 AD2d 186, *supra*; *Crawford v MRI Broadway Rental, Inc.*, 254 AD2d 68 [1st Dept 1998]).

In opposing the motion, plaintiff provided no evidence to raise a disputed issue of fact on

the issue of notice. Thus, dismissal of plaintiff's claim that the stairs were wet, slippery, or otherwise defective is warranted.

However, defendant failed to make a *prima facie* showing of entitlement to judgment as a matter of law dismissing plaintiff's Complaint based upon defendant's alleged failure to provide proper illumination of the steps inside The Roxy.

New York City Building Code §27-540 (Exit lighting), on which plaintiff relies, provides in subsection (a) that:

In addition to the requirements of subchapter six of this chapter, lighting shall be provided in the following areas: (a) Safe areas. Safe areas shall be artificially lighted by electrical means at all times during occupancy of a place of assembly so as to provide illumination of at least five foot candles at the level of the floor and on the surface of all stairs, steps, ramps, and escalators within the safe area.

Defendant did not challenge the applicability of this section to the stairs in question. Instead, defendant argues that caselaw requires plaintiff to obtain expert testimony for any claim regarding inadequate lighting, and that plaintiff failed to produce any expert witness that the subject stairs lacked inadequate lighting. Yet, the only evidence defendant submitted in support of its motion was the deposition testimony of its manager and that of plaintiff. The manager's testimony was essentially that the lighting in the subject theater was sufficient. In this regard, when asked if he recalled whether the ceiling light was working on the night in question, he stated that his custom and procedure was to "check and make sure the lights were on" and if the lights were not working, "the technician would be able to change it before [The Roxy] opened." (McLean's EBT, page 31). Defendant's manager further testified that he did not recall the particular ceiling light above the steps "being off."

Not only has defendant, as the movant on the summary judgment motion, failed to submit expert testimony to support its claim that plaintiff's inadequate lighting claim lacks merit, but also, defendant's submissions do not establish, as a matter of law that plaintiff's inadequate lighting claim lacks merit. While the deposition testimony of defendant's manager slightly indicates that the light above the ceiling may have been operable and working on the night in question, there is no definitive testimony on this point. Nor would defendant's manager's testimony that the available ceiling light was adequate to safely illuminate the steps pursuant to the Building Code be sufficient in view of the lack of evidence that he has any expertise in this field (*see Wilson v Proctors Theater & Arts Center & Theater of Schenectady, Inc.*, 223 AD2d 826, 636 NYS2d 456 [3d Dept 1996]). Moreover, plaintiff's testimony, by contrast, was essentially that there was "no" lighting in the area of the steps, and that the lighting in the area was "terrible" and "dark." Plaintiff's testimony advances the claims made in his bill of particulars, that there were no lights to illuminate the steps, the steps were inadequately illuminated, and that defendant had actual and constructive notice of such dangerous condition. Thus, defendant's submissions fail to establish that the lighting in the area was actually turned on at the time of the accident or that the lighting was adequate for safe traversal of the stairs.

Reyes v La Ronda Cocktail Lounge (27 AD3d 397 [1st Dept 2006]) does not warrant a different result. In *Reyes*, plaintiff slipped on a wet spot near the bathroom of defendant cocktail lounge, and argued that the conflict between her testimony and that of defendant's manager as to the amount of light in the lounge raised an issue of fact as to whether inadequate lighting contributed to her slip and fall. In affirming summary judgment in favor of the cocktail lounge, the First Department held that the "assertion that the area was "dark" or "dim" was insufficient,

particularly inasmuch as cocktail lounges are expected to be dimly rather than brightly lit. Here, however, plaintiff did not testify solely that the area was dark or dim; he testified, upon further questioning, that there were “no” lights over the steps at all at the time of his accident.

Thus, although plaintiff’s testimony alone may be insufficient to raise a triable issue of fact on her claim of inadequate lighting (*see Branham v Loews Orpheum Cinemas, Inc.*, 31 AD3d 319, *supra*), defendant’s testimony alone, as the movant for summary relief, is insufficient to satisfy its initial burden on the motion for summary judgment.

With respect to plaintiff’s claim of inadequate handrails, New York City Building Code §27-375 (f)(1) (Interior stairs), on which plaintiff relies, provides that

- (f) Guards and handrails. Stairs shall have walls, grilles, or guards at the sides and shall have handrails on both sides, except that stairs less than forty-four inches wide may have a handrail on one side only. Handrails shall provide a finger clearance of one and one-half inches, and shall project not more than three and one-half inches into the required stair width.
- (1) Stairs more than eighty-eight inches wide shall have intermediate handrails dividing the stairway into widths that maintain the nominal multiples of twenty-two inches, but the widths shall not be greater than eighty-eight inches nor less than forty-four inches.

Again, defendant did not challenge the applicability of this section to the stairwell area in question. Instead, defendant argued that plaintiff was required to obtain expert testimony to support his inadequate handrail claim, and that plaintiff failed to produce any expert witness in this regard.

Defendant, as the movant on the summary judgment motion, again failed to submit expert testimony to support its position that plaintiff’s inadequate handrail claim lacks merit. Further, defendant’s submissions do not establish, as a matter of law that such claim lacks merit. At his deposition, defendant’s manager testified that metal “railings on both sides” of the “steps” had

been there “[a] long as I’ve been there.” (McLean EBT, pages 27, 40-41). However, plaintiff testified that there were “no rails” and “no banisters” on the stairway (Plaintiff’s EBT, pages 27-32). When later shown photographs of the area, plaintiff testified that “these rails were not there. This rail over here is where I fell. There was a wall there. I used a wall to come down the steps so the rail wasn’t there.”

Further, there is no definitive testimony as to dimensions of the subject stairs, and that intermediate handrails were not required. Nor would defendant’s manager’s testimony alone on this point, or testimony that there were handrails on the stairs be sufficient, in view of the lack of evidence that he has any expertise in this field (*see Wilson v Proctors Theater & Arts Center & Theater of Schenectady, Inc.*, 223 AD2d 826, 636 NYS2d 456 [3d Dept 1996]). Plaintiff’s testimony advances the claims made in his bill of particulars, that defendant failed to install adequate handrails in the area, and that defendant had actual and constructive notice of such dangerous condition. Thus, in light of the issue of fact as to whether handrails were present on the night of the incident, and the inadequacy of defendant’s submissions, summary judgment dismissing plaintiff’s inadequate handrail claim is unwarranted.

Based on the foregoing, it is hereby

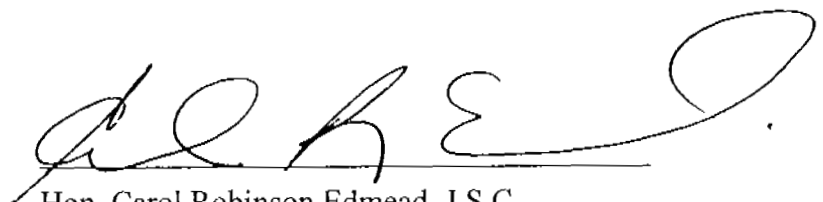
ORDERED that the motion by defendant pursuant to CPLR 3212 for summary judgment dismissing plaintiff’s Complaint is granted solely to the extent that plaintiff’s claim that the steps

were wet, slippery, and otherwise defective is dismissed, and denied as to plaintiff's inadequate lighting and inadequate handrail claims; and it is further

ORDERED that defendant serve a copy of this order and memorandum opinion with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: October 2, 2007



Hon. Carol Robinson Edmead, J.S.C.

FILED
OCT 05 2007
NEW YORK
COUNTY CLERK'S OFFICE