

Raczy v 33 Bre Inc.

2008 NY Slip Op 30556(U)

February 19, 2008

Supreme Court, New York County

Docket Number: 0117587/2005

Judge: Milton A. Tingling

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

PRESENT: **HON. MILTON A. TINGLING**

PART 44

Index Number : 117587/2005

RACZY, ROBERT

vs

33 BRE

Sequence Number : 006

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 10/17/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross-motion are denied pursuant to annexed decision.

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

FILED
FEB 29 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/19/08

MMA
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: IAS PART 44

HON. MILTON A. TINGLING
J.S.C.

-----X
ROBERT RACZY,

Plaintiff,

-against-

Index No. 117587/05

33 BRE INC., GOLD STREET PROPERTIES, L.P.,
33 CGP INC., SPA 88 LLC d/b/a WALL STREET
BATH & SPA and WALL STREET BATH & DAY
SPA, Z & L POCH, INC.,

Defendants.

FILED
FEB 29 2008
NEW YORK
COUNTY CLERKS OFFICE

-----X
MILTON TINGLING, J.:

The defendants 33 Bre Inc., Gold Street Properties, L.P. and 33 CGP Inc. (collectively landlord) move, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint and cross claims, and for judgment over on their cross claims against the codefendants Spa 88 LLC d/b/a Wall Street Bath & Spa and Wall Street Bath & Day Spa (collectively tenant).

The tenant cross-moves, pursuant to CPLR 3211 and 3212, for an order dismissing the complaint and cross claims.

This is an action to recover damages for personal injuries suffered by the plaintiff Robert Raczy (Raczy) when, exiting a party being given in the basement nightclub at 33 Gold Street in Manhattan, he fell from a landing, over the handrail, back to the basement floor below. Raczy cannot state with certainty what caused him to fall. Raczy suffered skull fractures, fractured ribs, and a fractured pelvis. The nightclub bouncers directed Mr. Raczy's friend to carry his limp body out of the nightclub and place it on the sidewalk outside, to await the arrival of the

ambulance.

According to a Buildings Department violation dated April 1, 2002, in breach of its certificate of occupancy, on Friday and Saturday nights the subject basement changes from a health spa, to an illegal night club/adult establishment. In addition, reminiscent of the "Happyland" fire in the Bronx at which so many perished, there are a series of Buildings Department violations against the construction of the premises for: locked/blocked egress, no secondary means of egress, the narrow stairway, narrow corridor, improper exit door, a lack of signs and handrails, and an unenclosed stair (see exhibit "E" to affirmation in opposition).

In support of its motion, the landlord submits a carefully worded affidavit from a licensed architect alleging that the handrail is securely attached, that it exceeds the height requirement of the Building Code, and that from an architectural design standpoint the height of the railing was not an inherent hazard at the aforementioned platform area. However, the landlord's architect fails to offer his professional opinion of the safety of the landing platform, and omits to mention the series of Building Department violations. The landlord argues that, as an out-of-possession landlord without notice, it had no responsibility for the conditions that the plaintiff alleges caused his accident. The landlord also argues that, pursuant to the terms of the lease, the tenant is obligated to indemnify it.

In support of its cross motion, the tenant makes the following arguments. It neither created, nor had notice of the allegedly dangerous condition. The accident occurred due to the plaintiff's intoxication. The *res ipsa* doctrine is inapplicable. The landlord's motion for indemnification must be denied because the lease indemnification clause is void.

In opposition to the motions, the plaintiff concedes the fact that the railing height meets

the Building Code, but submits an affidavit from a licensed professional engineer alleging that, in his professional engineering opinion, the accident egress, including the exit street doors and adjacent interior platform, are unsafe, hazardous and deficient in its design and installation. More specifically, it is alleged that the doors should open outward only. Once they are opened inward, the platform width is shortened and compromised, requiring a railing higher than the existing 38 3/4". In addition to the compromised platform width, the door handle is too ornate to be grippable, requiring additional movement for a patron to exit. The width of the platform is insufficient when the door is opened inward. The engineer cites Building Code violations of New York City Administrative Code § 27-127 (egress compromised); § 27-128 (owner responsible for safety); and §§ 27-361, 27-375 (d), 27-375 (g) (egress obstructed). The plaintiff argues that triable issues of fact exist so as to preclude summary judgment.

In reply, both the landlord and the tenant claim to be surprised that the plaintiff is claiming that the landing is defectively designed.

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 issue of fact from the case (JMD Holding Corp. v Congress Fin. Corp., 4 NY3d 373 [2005]; Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979]). The failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Mere conclusions, expressions

of hope, or unsubstantiated allegations are insufficient for this purpose (Zuckerman v City of New York, 49 NY2d 557 [1980]). It is uncommon to grant summary judgment in a negligence action, even where the facts are uncontradicted (Ugarriza v Schmieder, 46 NY2d 471 [1979]).

The defendants were under a duty to act in a reasonable manner to maintain safe conditions on their property 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, foreseeability of injury being the measure of the duty (Basso v Miller, 40 NY2d 233 [1976]). In this case, the foreseeability of injury resulting from use of the landing and door, is a question of fact precluding summary judgment regardless of whether or not the landing handrail is in compliance with the applicable Building Code.

The plaintiff Raczy's expert's opinion has probative value and is sufficient to raise a triable issue as to the existence of a dangerous or hazardous condition at the exit landing. This issue, as well as Raczy's contributory negligence and proximate cause are matters which must await trial.

The failure of the movants to even address the twin issues of their illegal change in use of the basement from health club to night club in violation of both the Building Code and the certificate of occupancy, together with the series of violations issued against the basement egress by the Department of Buildings, is sufficient reason to deny the motions.

In addition, a landlord may be liable for injuries caused by a dangerous or defective condition on leased premises if it has contracted by a covenant in the lease to be responsible for repairs, if performance of the covenant would have prevented an unreasonable risk of harm to persons upon the leasehold, and if the landlord failed to exercise reasonable care to perform its obligations under the lease (Putnam v Stout, 38 NY2d 607 [1976]). Here, the subject lease reserves the right for the landlord to enter the premises for the purpose of inspection and

maintenance or repair. The out-of-possession landlord with a general right of reentry is also liable for structural defects and specific statutory violations (Lesocovich v 180 Madison Ave. Corp., 81 NY2d 982 [1993]). Under the circumstances of this case, there are triable issues of fact as to whether the property owners exercised reasonable care to remedy the allegedly dangerous condition.

Contrary to the tenant's contention, the lease's indemnification clause is not void and contribution and implied indemnification are available to the landlord against the tenant based upon both the lease and the common law (Mas v Two Bridges Assoc., 75 NY2d 680 [1990]; City of New York v Kalikow Realty Co., 71 NY2d 957 [1988]; Guzman v Haven Plaza Hous. Dev. Fund Co., 69 NY2d 559 [1987]). However, any apportionment will have to await further development of the facts.

However, submission of a case on the theory of res ipsa loquitur is warranted only when the plaintiff can establish the following elements: (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency of instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff (Kambat v St. Francis Hosp., 89 NY2d 489 [1997]; Dermatossian v New York City Tr. Auth., 67 NY2d 219 [1986]). Here, the exit was continuously available for use by other patrons and thus, was not within the defendants' exclusive control. Moreover, the accident was not of a kind which ordinarily does not occur in the absence of someone's negligence. Finally, there are factors, such as intoxication, demonstrating that the plaintiff Raczy may have contributed to the occurrence. Therefore it does not appear that res ipsa loquitur applies to this case. However, as the complaint sets forth a

single cause of action, there is nothing for the court to dismiss.

On the question of surprise, the plaintiff Raczy failed to recall the precise way in which he fell, and submits an engineer's affidavit detailing the hazardous condition. Raczy did not learn about the details of the defective landing platform until he received the expert's affidavit. Under the circumstances, questions of fact are present sufficient to defeat summary judgment.

Accordingly it is

ORDERED that the motion and the cross motion are denied.

Dated: 2/19/08

ENTER:

MAT

**HON. MILTON A. TINGLING
J.S.C.**

FILED
FEB 29 2008
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