

**Bible v Wine Gallery Realty Corp.**

2008 NY Slip Op 30741(U)

March 5, 2008

Supreme Court, Nassau County

Docket Number: 4433-04/

Judge: Stephen A. Bucaria

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# SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

TRIAL/IAS, PART 4  
NASSAU COUNTY

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LINDA M. BIBLE, as the Executrix of the  
Estate of CHARLES BIBLE, deceased,

Plaintiff,

INDEX No. 4433/04

MOTION DATE: Jan. 8, 2008  
Motion Sequence # 002

-against-

WINE GALLERY REALTY CORP., 2172  
HEMPSTEAD, INC. and RUNYON'S  
ROADHOUSE A/K/A RUNYON'S  
ROADSIDE TAVERN,

Defendants.

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The following papers read on this motion:

Notice of Motion..... X  
Affirmation in Opposition..... X  
Reply Affirmation ..... X  
Memorandum of Law..... X

This motion, by defendants, pursuant to CPLR 3212 for summary judgment dismissing the complaint is **denied**.

Charles Bible fell on October 9, 2003, as he was leaving Runyon's Tavern located at 2172 Hempstead Turnpike in East Meadow, New York through the back exit at

approximately 7:30 P.M. He fell down the second step of the exit to the parking lot, and plaintiffs complain that the subject step is an unexpected "trap." Although Mr. Charles had frequented Runyon's on a weekly basis for years, he testified that he had exited the premises through the back exit only 6 times prior to October 9, 2003. On that date Mr. Charles stepped down from the backyard patio at Runyon's onto the patio platform, pushed open the gate from the backyard patio, stepped down onto the concrete surface leading to the parking lot, saw that his car was blocked in, turned to go back inside, stepped back up onto the patio platform, yelled into the back bar if anyone owned the car blocking his, and was waiting for a response when two people got up and walked towards the gate as if they were going to leave. In order to avoid the leaving patrons Mr. Bible stepped backward. His back hit the gate which swung open (Bible, C., transcript, p.110). He didn't "have a good step on it" (Bible, C., transcript, p. 111)," and he fell off the step to the parking lot. Mr. Bible admits that he didn't realize where he was standing (Bible, C., transcript, p. 111) when he stepped backward and hit the gate, and states that he lost his balance because the gate gave way (Bible, C., transcript, p. 112). His fall backwards started when the gate opened up behind him (Bible, C., transcript, p. 114).

Due to the death of Mr. Bible (due to causes unrelated to this accident) on December 7, 2005, this action was stayed until the caption was amended to reflect Mrs. Bible as the Executrix of the Estate of Charles Bible. The note of issue and certificate of readiness was filed on June 5, 2007, and according to defendants' affidavit of service, this motion for summary judgment was served on August 3<sup>rd</sup>, 2007, within the required 60-day period.

Summary judgment is the procedural equivalent of a trial (S.J. Capelin Assoc., Inc. v Globe Mfg. Corp., 34 NY2d 338, 341, 1974). The proponent of a motion for summary judgment must make a **prima facie** showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (see, Alvarez v Prospect Hosp., 68 NY2d 320,1986; Zuckerman v City of New York, 49 NY2d 557,1980). Once the movant makes its **prima facie** showing, the burden shifts to the opponent, who must produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial (Alvarez; Zuckerman). Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient (Zuckerman). Summary judgment will not be defeated by surmise, conjecture or suspicion (Shaw v Time-Life Records, 38 NY2d 201, 207,1975).

A landowner had a duty to maintain its premises in a reasonably safe condition (see, Basso v Miller, 40 NY2d 233, 241, 1976). However a landowner has no duty to

protect against a condition that is not inherently dangerous (Groon v Herricks Union Free School District, 42 AD3d 431, 2<sup>nd</sup> Dept., 2007). Furthermore, although the issue of proximate cause is generally one to be determined by the trier of fact, it is the function of the court to determine if a **prima facie** case of causation has been established in the first instance (Outlaw v Citibank, 35 AD3d 564, 2<sup>nd</sup> Dept., 2006).

Defendants submit the transcript of Mr. Bible's deposition where he describes how he fell when he lost his balance as he hit the gate. They deny that the subject step violates any statutory code or regulation and they insist that there has been no showing that the step constitutes an unsafe or hazardous condition. On this record, defendants have presented a **prima facie** case for summary judgment in their favor on the issue of liability, and therefore the burden now shifts to plaintiffs to create an issue of fact.

Plaintiffs argue that the step from which Mr. Bible fell is a dangerous trap because it is an angled and non-uniform step, varying in depth from approximately 12 inches to 6 inches. Plaintiffs assert that the narrow edge of the step, next to the fence and through the gate, is not wide enough to fit an individual's foot on it.

In addition to photos of the step, plaintiffs submit an affidavit from their engineering expert, Stanley Fein. Mr. Fein avers that the "spring-loaded gate was installed too close to the edge of the exterior single step, thereby creating a dangerous and hazardous condition since there was not a sufficient recovery platform, and that the subject step violates New York State Building Code §726.5(a)(9) (Fein affidavit pars. 15 to 20). He further opines that the subject gate should have a lock or latch, which would have prevented it from unexpectedly swinging open (Fein affidavit, par. 21-22).

This Court was unable to locate the section of the New York State Building Code cited by plaintiffs' expert. It did find, however, that, effective January 1, 2003, the New York State Uniform Fire Prevention and Building Code, formerly found in 9 NYCRR 600.1 et. seq., was repealed, and replaced by nine separate codes starting at 19 NYCRR 1219.1. Moreover, the subject step would be subject to code provisions in effect at the time the step was constructed (Ryan v KRT Property Holdings, LLC, 45 AD3d 663, 2<sup>nd</sup> Dept., 2007). While there is testimony by Mr. Balliet, a part owner of Runyon's, that the restaurant has been operating at that location since 1995, and that the steps were in the same position when the restaurant opened for business (Balliet transcript, p. 19) it is unclear when the steps were constructed.

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The step at issue is plainly irregular, and the dimensions of the step may have been the proximate cause of plaintiff's fall. Inasmuch as the date of the construction of the steps is uncertain, which directly affects the applicability of the New York State Building Code to the configuration of the steps, there are issues of fact that preclude a determination herein.

On this record, plaintiffs have raised a triable issue of fact that the step was defective or constituted a dangerous condition. Consequently, summary judgment dismissing the complaint must be **denied**. With respect to that aspect of the motion that the defendants' alleged breach of duty proximately caused the decedent plaintiff's injury, while it is certainly accurate to state that the decedent plaintiff had a pre-existing medical condition, the plaintiff's treating physician avers, in his submission, that the subject incident was the competent producing cause of the decedent/plaintiff's aggravated back condition, i.e., a herniated disc, that required a L4-5 Lumbar laminectomy, aggravation, exacerbation of L5-S1 Spondylolysis, aggravation of radiculopathy and restriction of motion of lower back, buttock and leg. The defendant's witness/physician has a contradictory opinion, and this battle of experts resolves nothing on this motion. Such disparity of opinion requires a trial.

Therefore, the motion is **denied**.

Dated MAR 05 2008

*Stephen A. Berman*

I.S.C.  
**ENTERED**

MAR 07 2008  
NEW YORK COUNTY  
COUNTY CLERKS OFFICE