

Tenety v Bistro Cassis, Inc.

2008 NY Slip Op 31726(U)

June 7, 2008

Supreme Court, New York County

Docket Number: 0101630/2007

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 101630/2007

TENETY, JOHN

VS.

BISTRO CASSIS, INC.

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n 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

for summary judgment and cross motion are decided per attached

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

FILED

JUN 23 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/17/08

EG

EMILY JANE GOODMAN

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: PART 17

-----X
JOHN TENETY,

Plaintiff,

-against-

BISTRO CASSIS, INC,

Defendant.

-----X
EMILY JANE GOODMAN, J.S.C.:

Index No.: 101630/2007

FILED
JUN 23 2008
COUNTY CLERK'S OFFICE
NEW YORK

This is an action for personal injuries sustained by the plaintiff, John Tenety when he allegedly fell off a raised platform from a restaurant chair in which he was seated. Defendants move for summary judgment dismissing the complaint on the ground that the condition complained of was open and obvious and not inherently dangerous. Plaintiff cross moves for summary judgment in his favor and opposes the motion. Both motions are denied because an issues of fact exist as to whether the condition was open and obvious, inherently dangerous, and whether Plaintiff is comparatively negligent.

Plaintiff testified that he was seated by an employee of the restaurant Bistro Casis (the restaurant), that the restaurant was "dimly lit" and that while seated, his back was to a raised platform. Plaintiff testified that after 50-65 minutes of dining, he moved his chair slightly back to pick up a credit card which had fallen after a waitress attempted to return it to him. The chair legs went off the landing, causing him to fall to the ground. Although Plaintiff had been to the restaurant twice before, he testified that he had never sat in the platform section. The Chief Financial Manager for the entity that manages the restaurant's books and records, who frequents the restaurant, testified that the lighting was "typical restaurant lighting." Curiously, as part of its

motion, Defendant attaches photographs of the purported area in question, taken a few weeks after the accident, which Plaintiff testified fairly and accurately depicted the condition at issue. These photographs do not support Defendant's motion but rather, demonstrate that issues of fact exist for the jury.

The proponent of a summary judgment motion has the initial burden of establishing, by evidentiary proof in admissible form, the cause of action or defense sufficiently to warrant the court as a matter of law to direct judgment in their favor. CPLR 3212; GTF Marketing, Inc. v Colonial Aluminum Sales, Inc., 66 NY2d 965, 967 (1985); Zuckerman v City of New York, 49 NY2d 557, 562 (1980). "The failure to make such a prima facie showing requires a denial of the motion regardless of the sufficiency of the opposed papers" Ayotte v Gervasio, 81 NY2d 1062, 1063 (1993), quoting Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); see also JMD Holding Corp. v Congress Financial Corp., 4 NY3d 373, 384 (2005); In re Kasziner, 298 AD2d 109 (1st Dept 2002).

In support of its motion, Defendant cites Webber v Miller (17 AD2d 352 [2d Dept 2005]), and other cases in the Second Department, where summary judgment was granted to defendants on the grounds that the condition was open and obvious where plaintiffs tripped and fell from stairs. However, as Plaintiff correctly points out, this is not a case where Plaintiff tripped and fell over the platform but rather involves the issue of defendant's placement of a restaurant chair next to a raised platform. Defendant also maintains that the restaurant did not receive prior complaints of the condition, but this argument is irrelevant as the evidence indicates that the restaurant created the allegedly dangerous condition.

Plaintiff maintains that he must be granted summary judgment because of proof of the

physical layout of the restaurant and the photographs indicate that the area was “a trap,” and that Plaintiff could not be at fault because the restaurant was dimly lit and he did not have “eyes in the back of his head.” In support of his cross motion, Plaintiff cites several First Department cases which hold that although a landowner does not have a duty to warn of an open and obvious danger, a landowner cannot maintain an unreasonably dangerous condition, and if the condition is both unreasonably dangerous yet open and obvious, the plaintiff may be comparatively at fault, but the landowner cannot escape liability (see, e.g., Cohen v Shopwell, Inc., 309 Ad2d 560 [1st Dept 2003]). Plaintiff also cites Femenella v Pellegrini Vineyards, LLC (16 AD3d 546 [2d Dept 2005] [where plaintiff fell from a chair placed by defendant too close to the edge of a platform surrounded by hedges, the issue of whether condition was open and obvious was an issue of fact for the jury, and, even if the condition was open and obvious, the defendant still had duty to maintain premises in a reasonably safe condition, raising only an issue of comparative negligence]) and Chambers v Maury Povich Show (285 AD2d 440 [2d Dept 2001] [where plaintiff fell from a chair placed by defendant too close to the aisle, defendant was not relieved of liability even if the condition was open and obvious, but an issue was raised as to plaintiff’s comparative negligence]).

In reply Defendant cites Schulman v Old Navy/Gap Inc., 45 AD3d 475 [1st Dept 2007] [plaintiff’s complaint dismissed because brackets on clothing rack were an open and obvious condition of which plaintiff was aware, and the condition was not inherently dangerous]). Notably, that case cited another case, Maureillo v Port Authority of NY and NJ, 8 AD3d 200 [1st Dept 2004]), holding that an open and obvious condition could be rendered a “trap” when obscured or when a persons attention was otherwise distracted. Defendant also attempts to

distinguish the two Second Department cases involving negligent placement of chairs because the distances between the chairs and platforms may have been less than in this case.

Both motions for summary judgment must be denied. The layout and photographs of the accident scene, the disputed issues of lighting and whether the condition constituted a trap for Plaintiff who may have been distracted while picking up his credit card after having his back to the platform for approximately one hour, raise issues of fact for the jury as to whether the condition was open and obvious, inherently dangerous, and whether Plaintiff is comparatively negligent (Femenella, 16 AD3d 546, supra; Chambers, 285 AD2d 440, supra; Maureillo, 8 AD3d 200, supra).

For the foregoing reasons, it is hereby

ORDERED that Defendants' motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED that Plaintiff's cross motion for summary judgment in his favor is denied.

This Constitutes the Decision and Order of the Court.

Dated: June 17, 2008

ENTER:



J.S.C.

EMILY JANE GOODMAN

