

Steisel v Golden Reef Diner

2008 NY Slip Op 31837(U)

June 18, 2008

Supreme Court, Nassau County

Docket Number: 5152-06/

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

MARILYN STEISEL and JERALD STEISEL,

Plaintiffs,

- against -

GOLDEN REEF DINER and D.T.G.C. REALTY
CORP.,

Defendants.

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 5152/06

Motion Sequence No. 001

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u>3</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The defendants move for an order pursuant to CPLR 3212 granting summary judgment on the issue of liability, and dismissing all claims against them. The plaintiffs oppose this motion. The underlying personal injury action from an incident on October 31, 2003, between 11:00 p.m. and midnight at the defendants' restaurant. The plaintiff allegedly fell approximately 15 to 20 feet from the bathroom due to a greasy substance on the floor, and suffered a left radial non-displaced fracture and left rotator cuff tendinitis.

The defense attorney states, in a supporting affirmation dated February 25, 2008, it is clear from the injured plaintiff's testimony, the plaintiffs cannot affirmatively set forth

a single negligent act by the defendants which caused the injury. The defense attorney points out both plaintiffs, husband and wife after approximately 45 minutes in the restaurant left their table to use the restroom; walked through the main part of the diner, over generally the same area of the incident, to the restroom without any occurrence; but while en route to their table, the plaintiff walked over the same general area, a foot slid on something, and the plaintiff fell. The defense attorney notes the plaintiff's husband testified he never saw any condition, and was in the bathroom when the wife fell. The defense attorney asserts the July 31, 2007 deposition testimony of George Kokaris, the restaurant manager, shows the restaurant is constantly cleaned, he inspected the floor, and the floor was clean on October 31, 2003, during his 6:00 p.m. to 11:00 p.m. shift. The defense attorney avers Kokaris testified he pointed out to the injured plaintiff that night there was no foreign substance nor liquid on the floor.

The plaintiffs' attorney states, in an opposing affirmation dated March 19, 2008, the plaintiff slipped and fell in the diner as a result of a dirty, greasy, oily and slippery substance or liquid on the floor in the booth area. The plaintiffs' attorney states the note of issue was filed on November 28, 2007, 90 days from February 26, 2008, but the defendants filed this motion on February 28, 2008, so it is untimely. The plaintiffs' attorney asserts, as a matter of law, the plaintiffs must show good cause to file a late motion for summary judgment, but the defendants did not seek that relief nor was that relief extended by the Court to the defendants. The plaintiffs' attorney nevertheless

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contends the defense motion should be denied because there are multiple issues of fact, and points to the deposition testimony of the plaintiffs. The plaintiffs' attorney avers the defendants cannot establish the absence of actual and constructive notice; the dirty grease condition was present for a lengthy time; and the plaintiffs did not cause nor create the defect.

The defense attorney states, in a reply affirmation dated April 11, 2008, this motion is timely under the December 2006 preliminary conference order. The defense attorney challenges the plaintiffs' assertion regarding the duration of the condition, and avers both plaintiffs did not observe any condition on the floor before going to the bathroom, and the husband walked over that area without a problem seeing no adverse condition presumably seconds after the wife fell. The defense attorney contends requisite notice could not possibly be established in this short duration of time. The defense attorney counters the plaintiffs' burden of proof argument regarding a showing of notice. The defense attorney asserts that burden is on the plaintiffs, and there is no evidence as to how this grease allegedly got on the floor nor how long it was there before the accident. The defense attorney states Kokaris was at the diner at the time of the injured plaintiff's fall, to wit the plaintiff testified Kokaris was standing there with his arms folded across his chest looking at the plaintiff; he gave his card and identified himself as the manager to the plaintiffs, and offered to help the injured plaintiff off the floor, but the plaintiff declined assistance. The defense attorney notes the plaintiff husband also testified

Kokaris was there, to wit Kokaris came over to the injured plaintiff; the plaintiffs said what happened; and the plaintiffs asked for Kokaris' card which he gave them. The defense attorney also points out Kokaris testified he was present, and saw the plaintiff on the floor, brought the plaintiff back to the table after the fall, and Kokaris and the plaintiff inspected the area of the fall together, but there was nothing on the floor.

This Court has carefully reviewed and considered all of the papers submitted by the parties with regard to this motion. This Court finds there is no evidence these defendants had created the condition or had actual notice of the alleged condition. The Second Department holds:

It is well settled that "[t]o prove a prima facie case of negligence in a slip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition" (*Bradish v. Tank Tech Corp.*, 216 A.D.2d 505, 506, 628 N.Y.S.2d 807; *see, Goldman v. Waldbaum*, 248 A.D.2d 436, 669 N.Y.S.2d 669). On a motion for summary judgment to dismiss the complaint based on lack of notice, the defendant is required to make a prima facie showing affirmatively establishing the absence of notice as a matter of law (*see, Goldman v. Waldbaum, supra*) *Meyer v. Pathmark Stores, Inc.*, 290 A.D.2d 423, 736 N.Y.S.2d 83, 83-84 [2nd Dept., 2002].

Here, the defendants have met that burden by showing affirmatively the absence of notice as a matter of law. "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it [*Negri v Stop & Shop*, 65 NY2d 625, 626; *Lewis v Metropolitan Transp. Auth.*, 64 NY2d 670, *affg on opn* at 99 AD2d 246,

249]" (*Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837-838, 501

N.Y.S.2d 646 [1986]). The evidence contains no evidence that anyone, including both plaintiffs, observed the alleged condition prior to the accident. While the injured plaintiffs describes the condition as being dirty, which would have provided some indication that it had been present for some period of time. The assertion that the condition appeared dirty after the accident, is insufficient to raise a triable issue with respect to notice to the defendants (*see Rivest v. Pizza Hut of America, Inc.*, 264 A.D.2d 388, 693 N.Y.S.2d 232 [2nd Dept., 1999]; *Kaufman v. Man-Dell Food Stores, Inc.*, 203 A.D.2d 532, 611 N.Y.S.2d 230 [2nd Dept., 1994]). Based on the evidence shown here, the condition that allegedly caused injured plaintiff's fall could have been deposited there only minutes or seconds before the accident and any other conclusion would be pure speculation (*see Gordon v. American Museum of Natural History, supra*).

Accordingly, the motion is granted.

So ordered.

Dated: **June 18, 2008**

ENTER:



J. S. C.
HON. ANTONIO I. BRANDVEEN

FINAL DISPOSITION XXX

NON FINAL DISPOSITION

ENTERED

JUN 23 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE