

**Bruno v 732 Amsterdam Tavern, Inc.**

2008 NY Slip Op 32610(U)

September 25, 2008

Supreme Court, New York County

Docket Number: 0111123/2005

Judge: Michael D. Stallman

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

PRESENT: HON. MICHAEL D. STALLMAN

PART 7

Justice

Frank Bruno and Andrea Bruno

INDEX NO. 111123/05

MOTION DATE 4/25/08

MOTION SEQ. NO. 005

MOTION CAL. NO. 20

- v -

732 Amsterdam Tavern, Inc.

The following papers, numbered 1 to 13 were read on this motion to/for SJ

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A-I

Answering Affidavits — Exhibits 1-12

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1-2

3-12

13

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion **"is determined in accordance with the annexed memorandum decision and order."**

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

**FILED**  
SEP 29 2008  
COUNTY CLERK  
NEW YORK

**HON. MICHAEL D. STALLMAN**

Dated: 9/25/08



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 7**

-----X  
FRANK BRUNO and ANDREA BRUNO,

Plaintiffs,

Index No. 111123/05

-against-

732 AMSTERDAM TAVERN, INC.,

Defendants.

-----X  
HON. MICHAEL D. STALLMAN, J.:

**FILED**

SEP 29 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Decision and Order

This action arises from alleged injuries sustained by plaintiff Frank Bruno, a New York City Police Officer, at 732 Amsterdam Avenue (the Premises) in New York, New York, which is owned by defendant 732 Amsterdam Tavern, Inc. (Amsterdam). According to the complaint, on August 13, 2002, Bruno followed a suspect wanted on a warrant into the Premises, and tripped on an unsecured tread on the first stair of the first-floor staircase, causing him to fall and sustain disabling and permanent injury to his back that required career-ending surgery.

Amsterdam now moves for summary judgment, pursuant to CPLR 3212, dismissing the complaint in its entirety on the grounds that: (i) defendant had no actual or constructive notice of the alleged defect in the stairs; (ii) the actions of Bruno were the sole cause of the accident; (iii) Bruno's action is barred by the firefighter's rule, and Bruno has failed to establish a cause of action pursuant to General Municipal Law § 205-e (1); (iv) the alleged defect is trivial and not actionable as a matter of law; and (v) Bruno failed to name a necessary party.

### ANALYSIS

Summary judgment is to be used sparingly, and should be granted only if the movant Amsterdam establishes that there are no triable issues of fact (Andre v Pomeroy, 35 NY2d 361 [1974]; Mosheyev v Pilevsky, 283 AD2d 469 [2nd Dept 2001]) and makes a prima facie showing of entitlement to judgment as a matter of law (Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Zuckerman v City of New York, 49 NY2d 557 [1980]).

Only after the movant has made such a showing is the party opposing the motion then required to come forward with proof in evidentiary form establishing the existence of triable issues of fact, or an acceptable excuse for his failure to do so. Zuckerman, 49 NY2d at 557; Davenport v County of Nassau, 279 AD2d 497 (2nd Dept 2001). Finally, Bruno, as the nonmovant on this motion is entitled to the benefit of every favorable inference, and, in any event, the evidence shall be viewed in a light most favorable to Bruno. Negri v Stop & Shop, 65 NY2d 625 (1985); Louniakov v M.R.O.D. Realty Corp., 282 AD2d 657 (2nd Dept 2001).

#### *Failure to Name a Necessary Party*

Amsterdam asserts that Bruno has failed to name Bradford N. Swett Management (Swett) as a defendant. Amsterdam maintains that it is not vicariously liable for Swett's negligence, and liability rests with Swett as the employer of the parties responsible for maintenance of the Premises.

This argument strains reason. It is beyond cavil that when there are multiple tortfeasors, a plaintiff may proceed against any or all defendants. Hecht v City of New York, 60 NY2d 57, 62-63 (1983); Siskind v Levy, 13 AD2d 538, 539 (2<sup>nd</sup> Dept 1961) (“[a] joint tort-feasor is neither an indispensable nor a conditionally necessary party under sections 180 and 193 of the Civil Practice Act”).

Moreover, the case upon which Amsterdam relies specifically holds that parties that are not vicariously liable for the acts of each other need not be parties to one action. See Xavier v RY Mgt. Co., 45 AD3d 677 (2<sup>nd</sup> Dept 2007). Amsterdam itself argues that it is not vicariously liable for the actions of Swett. Amsterdam's argument is misplaced.

Finally, Amsterdam alleges that it never controlled the employees responsible for maintenance, that Amsterdam has different responsibilities and defenses than Swett, and that judgment against Amsterdam would not affect judgment against Swett. This essentially confirms, however, that neither party could be inequitably affected by judgment against the other. See CPLR 1001 (a). As a result, Swett is not a necessary party.

The part of the motion which seeks summary judgment dismissing the complaint for failure to join a necessary party is denied.

*Triviality of Defect Causing the Accident*

"[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case, and is generally a question of fact for the jury." Trincere v County of Suffolk, 90 NY2d 976, 977 (1997) (citation and internal quotation marks omitted).

Here, Amsterdam correctly argues that a property owner may not be held liable for trivial defects in a walkway which do not constitute a trap or a snare. However, Amsterdam goes on to argue, partially based upon Outlaw v Citibank, N.A. (35 AD3d 564 [2<sup>nd</sup> Dept 2006]), that Bruno's expert's affidavit lacks foundation and engages in mere speculation because no measurements of the alleged defect were taken. Caldwell v Village of Island Park, 304 NY 268, 274 (1952) (width, depth, elevation, irregularity, and appearance of the defect as well as time, place and circumstance of the

injury are to be considered for a finding of triviality).

As Amsterdam bears the burden of demonstrating entitlement to judgment as a matter of law (CPLR 3212), applying its own logic, without such measurements, it cannot be granted summary judgment. This is especially true because pointing to gaps in Bruno's proofs is insufficient to carry such a motion. See Torres v Industrial Container, 305 AD2d 136 (1<sup>st</sup> Dept 2003).

What is more, "the presence of an edge which poses a tripping hazard renders the defect nontrivial." Glickman v City of New York, 297 AD2d 220 (1<sup>st</sup> Dept 2002); see also Argenio v Metropolitan Transp. Auth., 277 AD2d 165 (1<sup>st</sup> Dept 2000).

In any event, "[e]ven a small difference in height is actionable if the alleged defect has the characteristics of a trap, snare or nuisance." Pagano v Rite-Aid Corp., 266 AD2d 854, 854-855 (4<sup>th</sup> Dept 1999). As both parties repeatedly point out, Bruno did not see, upon cursory viewing, the defect that caused his injury. If such a defect cannot be readily seen, there may be an inference (Negri, 65 NY2d at 625) that the defect had the characteristics of a trap. Such issues raise questions of fact not amenable to summary disposition. See Argenia, 277 AD2d at 165.

The part of the motion which seeks summary judgment dismissing the complaint because the alleged defect was trivial as a matter of law is denied.

*Actual and/or Constructive Notice*

In order to be granted summary judgment, Amsterdam must demonstrate that it had neither actual nor constructive notice of the alleged defective condition of the Premises. Garcia v Jesuits of Fordham, 6 AD3d 163 (1<sup>st</sup> Dept 2004); see also Piacquadio v Recine Realty Corp., 84 NY2d 967, 969 (1994).

On this motion, plaintiffs do not raise a triable issue as to whether Amsterdam had actual notice of a defect, based on the testimony of Amsterdam employees that work on the Premises that Amsterdam had no actual notice of a defect.<sup>1</sup>

To demonstrate lack of constructive notice, Amsterdam must show that the alleged defect was not visible and apparent, and did not exist for a sufficient length of time prior to the accident to permit Amsterdam to discover and remedy the defect. Gordon v American Museum of Natural History, 67 NY2d 836, 837 (1986); George v New York City Tr. Auth., 41 AD3d 143 (1<sup>st</sup> Dept 2007); Werny v Roberts Plywood Co., 40 AD3d 977 (2<sup>nd</sup> Dept 2007) (“defendant must submit evidence showing that the allegedly dangerous condition existed for an insufficient length of time for [the defendant] to have discovered and remedied it” [citation and internal quotation marks omitted]).

In this regard, one tenant, Houjing Lee, has offered that “[f]rom as early as 2001, the stairs within some areas of the [Premises] were in need of repair. The rubber stair tread on several stairs from the first floor to the fifth floor were popping up and loose.” Lee Affidavit, ¶ 4. Another tenant, Justin Plowman, offers that “[f]rom as early as June 2002 the stairs in the building were uneven and worn. Specifically, I recall that the rubber treading on the first step of the first floor staircase was raised and loose and coming up.” Plowman Affidavit, ¶ 4.

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<sup>1</sup> Bruno submits the affidavit of Alex Gradet in support of the assertion that Amsterdam had notice of the defect on the Premises. However, as Gradet was not timely identified as a notice witness, and Amsterdam has failed to identify any unusual or unanticipated circumstances, his affidavit cannot be considered. Muniz v New York City Hous. Auth., 38 AD3d 628 (2<sup>nd</sup> Dept 2007); Rodriguez v New York City Hous. Auth., 304 AD2d 468, 469 (1<sup>st</sup> Dept 2003); 22 NYCRR 202.21 (d).

\* 7 ] .

Amsterdam argues that the information given by the tenants is too vague to mandate a finding as a matter of law that it had actual or constructive notice of the condition. However, it is not Bruno's obligation to prove as a matter of law that constructive notice was given; the burden of proof on this motion remains with Amsterdam until shifted. CPLR 3212. Amsterdam has not demonstrated that it did not have constructive knowledge.

As the affidavits of the tenants raise an issue of fact as to whether Amsterdam should have known of the condition, the part of the motion which seeks summary judgment dismissing the complaint based on lack of notice is denied.

Firefighter's Rule

Amsterdam argues that Bruno may not recover for his injuries due to the operation of the "firefighter's rule." This rule historically barred recovery in common-law negligence by a police officer who had engaged in some act taken in furtherance of a specific police function, if that officer was thereby exposed to a heightened risk of sustaining the particular injury. Zanghi v Niagara Frontier Transp. Commn., 85 NY2d 423, 439 (1995); Delio v City of New York, 8 AD3d 325, 325 (2<sup>nd</sup> Dept 2004); compare Cooper v City of New York, 81 NY2d 584, 591 (1993).

Seemingly apropos, Zanghi specifically states that where, as here, the primary goal of the officers is to reach a location quickly, "care and caution in the steps taken to reach that location are naturally compromised." 85 NY2d at 440. As a result, the risk that an officer might be injured rushing down stairs to reach a co-worker was deemed within the ambit of the firefighter's rule, and recovery was barred.

In 1996, "the lawmakers enacted General Obligations Law § 11-106, which largely abolishes the firefighter's rule by giving firefighters and police officers a cause of action in negligence for

injuries suffered while in the line of duty (except as to actions against municipal employers and fellow workers).” Giuffrida v Citibank Corp., 100 NY2d 72, 78 (2003); Williams v City of New York, 2 NY3d 352 (2004) (“while a police officer can assert a common-law tort claim against the general public, liability against a fellow officer or employer can only be based on the statutory right of action in General Municipal Law § 205-e.”); Cosgriff v City of New York, 241 AD2d 382, 384 (1<sup>st</sup> Dept 1997), affd 93 NY2d 539 (1999) (“no tortfeasor, other than the employer of the injured or deceased police officer or firefighter, may challenge a claim of common-law negligence”). Amsterdam’s reliance on Foley v City of New York (43 AD3d 702 [1<sup>st</sup> Dept 2007]) is therefore misplaced, because that action was against a municipal employer. Contrary to defendant’s argument, the fact that General Obligations Law § 11-106 largely abrogated the firefighter’s rule does not lead to the conclusion that plaintiffs should have “add[ed] a cause of action pursuant to General Obligations Law § 11-106.” Reply Mem. at 31.

Under General Municipal Law § 205-e, Bruno may recover by: (i) identifying a statute or ordinance with which Amsterdam failed to comply; (ii) describing the manner in which he was injured; and (iii) setting forth facts from which it may be reasonably inferred that Amsterdam’s negligence directly or indirectly caused him harm. Giuffrida, 100 NY2d at 79-80; Zanghi, 85 NY2d at 441-444; see also Brophy v Gencroso, 137 AD2d 478, 478 (2<sup>nd</sup> Dept 1988).

Bruno claims that Amsterdam failed to comply with Administrative Code of the City of New York (Administrative Code) §§ 27-127 (all buildings and parts thereof shall be maintained in a safe condition; means of egress shall be maintained in good working order), 27-128 (the owner shall be responsible at all times for the safe maintenance of the building and its facilities), 27-375 (e) (risers and the treads shall comply with certain enumerated heights and widths), 27-375 (h) (treads must

be built of non-combustible materials, be solid, be built or surfaced with non-skid materials), and 27-381 (corridors and exits shall be provided with artificial lighting).

In addition, Bruno alleges violations of Multiple Dwelling Law §§ 52 (stairs shall be kept in good repair and in specific tread height and width), 57 (referring to bells and mail receptacles), and 78 (every multiple dwelling shall be kept in good repair). Finally, Bruno also alleges violations of Housing Maintenance Code § 27-2005 (the owner of a multiple dwelling shall keep the premises in good repair), and 27-2038 (electric lighting fixtures and certain public parts of dwellings).

Amsterdam argues that liability cannot be imposed based upon violations the Administrative Code §§ 27-127 or 27-128, because those provisions apply only to a specific structural or design defect in the Premises. Beck v Woodward Affiliates, 226 AD2d 328 (2<sup>nd</sup> Dept 1996). Here, the allegedly loose tread and poor lighting are clearly not structural nor design defects that would give rise a violation of Administrative Code §§ 27-127 and 27-128. Therefore, plaintiffs' claims under General Obligations Law § 205-e are dismissed to the extent that they are based on alleged violations of these sections.

Plaintiffs' bill of particulars alleged a violation of Article 18 of the Executive Law, known as the New York State Uniform Fire Prevention and Building Code Act. Executive Law § 370 et seq. As defendant points out, plaintiffs do not cite any specific section of Article 18 that defendants alleged violated, either in the pleadings or in opposition to this motion. Accordingly, plaintiffs must be deemed to have abandoned their reliance upon any violation of Article 18 of the Executive Law. See Genovese v Gambino, 309 AD2d 832, 833 (2d Dept 2003)(where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned).

Amsterdam omits to address the applicability of any of the other claimed statutory violations. Salient among these omissions is the failure to address Multiple Dwelling Law § 52, which requires that stairs be kept in good repair and in specific tread height and width, and Administrative Code § 27-375 (e), which provides that the rises and the treads of stairs shall comply with certain enumerated heights and widths.

To establish entitlement to judgment as a matter of law, Amsterdam was, at a minimum, required to demonstrate that it did not negligently violate any of the cited legislative provisions. Guiffrida, 100 NY2d at 82. It has failed to do so. As discussed above, Amsterdam does not meet its burden by pointing to gaps in plaintiff's proof. Except as to violations based on Administrative Code §§ 27-127 and 27-128, the part of the motion which seeks summary judgment dismissing Bruno's complaint based upon the firefighter's rule is denied.

*Direct or Indirect Cause*

Defendant argues that Bruno's testimony does nothing more than offer speculation that he tripped on the tread covering the first step, because he testified at his EBT that he did not know where he was looking when his right foot contacted with the tread, and did not know what caused him to trip. Peck Affirm., Ex E [Frank Bruno EBT], at 51-52. Defendant believes that it is entirely possible that one or two other detectives fell onto Bruno, causing him to fall, citing Bruno's EBT testimony.

“[T]o make out a claim under section 205-a, a ‘plaintiff is not required to show the same degree of proximate cause as is required in a common-law negligence action.’ Rather, the substantial case law that has developed on the subject holds that a plaintiff need only establish a ‘practical or reasonable connection’ between the statutory or regulatory violation and the claimed injury.”

Guiffrida, 100 NY2d at 81 [emphasis supplied]. Here, Bruno testified at his EBT that it was “very

possible” that “Det. Devito fell on top of [Bruno] **after** [he] fell.” Frank Bruno EBT, at 49 (emphasis supplied). Bruno did not know how far Det. Devito was behind him before he fell. Id. at 45. Therefore, defendant has not established that other defendants caused Bruno to fall. The possibility that Det. Devito or other detectives made contact with Bruno and caused Bruno to fall, or that Bruno misstepped, does not lead to the conclusion that the direct or indirect connection between the alleged violations and Bruno’s fall is speculative.

Although defendant argues that evidence permits only speculation as to the connection between the alleged violations and Bruno’s injuries, the Court views the issue raising a disputed question of causation for the factfinder. “Where causation is disputed, summary judgment is not appropriate unless ‘only one conclusion may be drawn from the established facts.’” Speller v Sears, Roebuck & Co., 100 NY2d 38, 44 (2003) quoting Kriz v Schum, 75 NY2d 25, 34 (1989).

Finally, defendant contends that plaintiffs have not pled a cause of action under General Municipal Law § 205(e), because the statute itself is not cited in either the complaint or the bill of particulars. Reply Mem. at 27. This argument, raised for the first time in reply, is without merit. “It has only been the dead hand of a criticized case that influenced courts to grant summary judgment for defendant when a plaintiff’s submissions, but not its pleadings, made out a cause of action.” Alvord and Swift v Stewart M. Muller Constr. Co., Inc., 46 NY2d 276 (1978). The Court notes that defendant initially believed that plaintiffs had asserted such a cause of action, because defendant addressed the merits of a claim under General Municipal Law § 205(e) in its initial moving papers.

**CONCLUSION**


Accordingly, it is hereby

**ORDERED** that the motion for summary judgment by defendant 732 Amsterdam Tavern, Inc. is granted to the extent that plaintiffs' claims under General Municipal Law § 205(e) that are based on alleged violations of Administrative Code §§ 27-127 and 27-128 are dismissed and violations of the New York State Uniform Fire Prevention and Building Code Act are abandoned, and the motion is otherwise denied; and it is further

**ORDERED** that the remainder of the action shall continue.

**Dated:** September <sup>25</sup>, 2008  
New York, New York

**ENTER:**

  
\_\_\_\_\_  
J.S.C.

**HON. MICHAEL D. STALLMAN**

**FILED**  
SEP 29 2008  
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