

Broodie v Gibco Enters., Ltd
2008 NY Slip Op 33669(U)
May 30, 2008
Supreme Court, Bronx County
Docket Number: 28674/2003
Judge: George D. Salerno
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NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 02

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

R.N.

Case Disposed	<input checked="" type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

BROODIE, JENNIFER

Index No. 0028674/2003

-against-

Hon. GEORGE SALERNO

GIBCO ENTERPRISES LTD.

Justice

The following papers numbered 1 to 16 Read on this motion, **SUMMARY JUDGEMENT DEFENDANT**
Noticed on **February 16 2007** and duly submitted as No. _____ on the Motion Calendar of 8/24/07

	PAPERS NUMBERED
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed Δ <i>Ritovs</i>	1-3
Answering Affidavit and Exhibits Δ <i>GIBCO</i>	4-6
Replying Affidavit and Exhibits Δ (R) <i>Opp</i>	7-8
_____ Affidavits and Exhibits Δ (G) <i>Reply</i>	9-10
Pleadings - Exhibit Δ <i>Ti</i>	11-12
Stipulation(s) - Referee's Report - Minutes Δ (G) <i>Reply</i>	13-14
Filed Papers Δ (G) <i>Reply</i>	15-16
Memoranda of Law	

Upon the foregoing papers this *Motion and Cross Motion*
are decided in the annexed memorandum
decision and order

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George Salerno
Hon. **GEORGE SALERNO, J.S.C.**

Respectfully Referred to: _____
Dated: _____

Dated: May 30, 2008

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----X
JENNIFER BROODIE,

Plaintiff,

-against-

GIBCO ENTERPRISES, LTD, and T. RHODES, INC.,
Defendants.

Index No.: 28674/2003

-----X
HON. GEORGE D. SALERNO:

This is an action to recover for alleged personal injuries sustained by Plaintiff, JENNIFER BROODIE, in a trip and fall accident on a yellow-and-black-striped single step, located in a hallway which led from a booth area, to the bar area¹, of the restaurant of Defendant, T. RHODES, INC., who was the tenant of commercial premises which it leased from the owner, Defendant, GIBCO ENTERPRISES, LTD. Immediately prior to her fall, BROODIE had been looking straight, at the telephone booth ahead of her.²

After she got up from her fall, BROODIE “looked”, and saw the three to four-inch³ step that was yellow and black in color⁴. The slanted stripes of yellow

¹ (Plaintiff EBT, p. 59, 72, 102).

² (Plaintiff EBT, p. 158-9).

³ Plaintiff never measured the step, but approximates that it was four inches high. (Plaintiff EBT, p. 189). GIBCO testified that the step was three to four inches high. (GIBCO EBT, p. 31). According to Defendant, T. RHODES, INC., the step was three inches high. (See T. RHODES EBT, by Eckman, p. 18).

⁴ Plaintiff BROODIE contradicts herself by characterizing the yellow color of the step as being both a “dark yellow” and a “light washed out yellow”.

and black are shown in the photographs⁵ which BROODIE identified at her deposition as accurately and fairly depicting the step area on the date of the accident.⁶

Defendant, T. RHODES, by its owner, testified that the area was illuminated by a light in the ceiling, and a lamp on the wall.⁷

In addition, Plaintiff BROODIE acknowledges where there was a yellow and black sign with the words "CAUTION WATCH YOUR STEP" located in the vicinity of the step.⁸ There was no type of debris, food, drink, water, sticky substances, or papers, on the step where Plaintiff fell; and that the adjacent carpeting was not ripped or torn – and so the accident is not attributable to any

(Plaintiff EBT, p. 59, 64, 189). Nonetheless, from Plaintiff's own photographs, the Court can see that there was a bold yellow color on this step. (See Plaintiff's Photographs, at Plaintiff's Exhibit "1").

⁵ Plaintiff's niece and sister, accompanied by the Plaintiff, took the photographs about a week after the accident. On that visit, Plaintiff BROODIE had no difficulty walking through the booth area to the bar area. (Plaintiff EBT, p. 66-85. See Plaintiff's Photographs, at Plaintiff's Exhibit "1").

⁶ (See Plaintiff's Photographs, at Plaintiff's Exhibit "1". Plaintiff EBT, p. 66-85). The striped caution tape was across the step on the date of the accident (See T. RHODES EBT, by Eckman, p.18).

⁷ (See T. RHODES EBT, by Eckman, p. 5, 29). This is consistent with Defendant GIBCO's testimony who stated that there was always a recessed "can" overhead with a "medium size flood". (GIBCO EBT, p. 36-7, 53-54).

⁸ (Plaintiff EBT, p. 77-78, 84, 179. See Plaintiff's Photographs, at Plaintiff's Exhibit "1").

such factors.⁹

The Yellow-and-Black-Striped Step Was Not Inherently Dangerous

It is well-established that a possessor of land and “landowners [have] no duty to protect or warn against conditions that are not inherently dangerous and that are readily observable by the reasonable use of one's senses.” Groon v. Herricks Union Free School Dist., 42 A.D.3d 431 (2d Dept. 2007).

The facts in Groon are illustrative, being very similar to those in the case at bar, since they involve a plaintiff who fell on a “**single step** in a hallway leading to the gymnasium, where voting was taking place, ... [and] the evidence in the record, including photographs taken by the plaintiff's daughter shortly after the accident, revealed that a **yellow line had been painted across the top of the step** to alert passersby [sic] of the height differential.” [emphasis added] Groon, supra. In addition, (*like the Plaintiff BROODIE in the case at bar*), the Plaintiff Groon acknowledged that she had not been looking at the step at the time of her accident – but had been looking ahead, “at a sign on the wall just before approaching the step.” Under such circumstances, plaintiff's complaint is properly dismissed.

In another recent similar case, a plaintiff fell on a “**single step**” while viewing a defendant's property during an open house, when “she failed to notice a height differential between the second floor hallway and one of the adjacent rooms and fell into the room. At the time of the accident, the plaintiff knew that she was

⁹ (Plaintiff EBT, p. 99, 159).

entering the room but was not looking where she was stepping; rather, she was observing colonial molding near the ceiling of the hallway, ...assuming that the room and the hallway were on the same level.” Pirie v. Krasinski, 18 A.D.3d 848, 849 (2d Dept. 2005).

The Pirie Court held that defendants had:

established their prima facie entitlement to judgment as a matter of law by tendering evidence that the height differential between the hallway and the bedroom was both open and obvious and not inherently dangerous (see Behar v All Seasons Motor Lodge, 6 AD3d 639, 775 NYS2d 183 [2004]; Wint v Fulton St. Art Gallery, 263 AD2d 541, 694 NYS2d 97 [1999]). Pirie v. Krasinski, 18 A.D.3d 848, 849-850 (2d Dept. 2005). In opposition, although the plaintiff Pirie had even tendered the affidavit of an architect, who opined that "a single step is a dangerous condition", the Court held that: “such generalized, conclusory, and speculative assertions with no independent factual basis are insufficient to defeat a motion for summary judgment.” Pirie v. Krasinski, 18 A.D.3d 848, 849-850 (2d Dept. 2005). In the case at bar, Plaintiff has not even tendered the affidavit of any expert addressing this issue.

Another strikingly similar matter involves a plaintiff who allegedly “tripped and fell over a **yellow speed bump** located in the parking lot of one of the defendant's stores,” [emphasis added] and the Court held the defendant was not negligent as a matter of law, explaining that:

By holding its property open to the public, a defendant has "a general duty to maintain it in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries" (Thornhill v Toys "R" Us NYTEX, 183 AD2d 1071, 1072; Binensztok v Marshall Stores, 228 AD2d 534). However, it is well settled that there is no duty on the part of the landowner to warn

against a condition, as here, that can readily be observed by those employing the reasonable use of their senses (see, *Ackerman v Town of Fishkill*, 201 AD2d 441, 443; *Tarricone v State of New York*, 175 AD2d 308).

Paulo v. A&P, 233 A.D.2d 380 (2d Dept. 1996). Like the yellow speed bump in *Paulo*, the yellow-and-black-striped step in the case at bar could not be overlooked by one employing the reasonable use of one's senses.

Another example is a recent First Department case where a plaintiff fell while descending two steps in an auditorium which led from the seats to a central aisle, and there was no claim that debris caused plaintiff to fall. The court held that, "as a matter of law, that the stairs did not pose a reasonably foreseeable hazard. ... **As with all owners of property with staircases, these defendants had no obligation to warn plaintiff of the precise number of steps separating the two levels.**" [emphasis added] *Jones v. Presbyterian Hosp.*, 3 A.D.3d 225, 226 (1st Dept. 2004). See *Nelson v. Wienecke*, 18 A.D.2d 392 (1st Dept. 1963).

----Lighting

Plaintiff BROODIE's inconsistent testimony about the lighting conditions fails to raise a credible issue of fact as to whether inadequate lighting may have been a proximate cause of her accident; and Plaintiff's Counsel, limited by his brief, does not argue or cite legal authority on this point. In a confusing fashion, Plaintiff BROODIE initially admitted that there was a light where the step was located, stating: "it was right next to the bar and it was dark but it was coming from behind", but then she denied that there were any lights near the step. Later, Plaintiff BROODIE testified that she did not "remember" if light fixtures were

there; but then she admitted that she never even looked “overhead to see what specific lighting there was.”¹⁰ Further, Plaintiff BROODIE had no difficulty seeing the step *after* she fell -- when she actually “looked” at it; and she had no difficulty walking through the same area with the same lighting conditions when she later went back to take the photographs.

Moreover, BROODIE acknowledged that, immediately prior to her fall, she had not been watching where she was stepping -- since she was looking straight ahead at the telephone booth.¹¹ Thus, even if the lights were brighter, it would not have made any difference.

In another case where a plaintiff’s testimony was merely “that she did not observe any lights in the theater”, the court held that such testimony “alone is insufficient as a matter of law to raise a triable issue of fact on her claim of inadequate lighting.” Branham v. Loews Orpheum Cinemas, Inc., 31 A.D.3d 319 (1st Dept. 2006). Restaurants’ dining booth areas and bars, like theaters, are not expected to be lit with very bright fluorescent lights.

Out-of-Possession Owner, Defendant GIBCO

As far as Defendant GIBCO, in addition to the foregoing reasons, as an out-of-possession owner, it would, nonetheless, not be liable to the Plaintiff BROODIE. The commercial lease between GIBCO and T. RHODES, consistent

¹⁰ (Plaintiff EBT, p. 63, 85-91, 158-60). Also, Plaintiff suffered from glaucoma in the right eye. (Plaintiff EBT, p. 145).

¹¹ (Plaintiff EBT, p. 158-9).

with Defendants' testimony, provides, in relevant part, that the "tenant will take good care of the demised premises, fixtures and appurtenances, and all alterations, additions, and improvements to either; make all repairs in and about the same necessary to preserve them in good order and condition."¹² Defendant GIBCO did not have a key to enter the restaurant.¹³ It has long-been established that:

an out-of-possession landlord may not be held liable for a third party's injuries on his premises unless he has notice of the defect and has consented to be responsible for maintenance or repair (Manning v New York Tel. Co., 157 AD2d 264, 266-269; see also, Worth Distribs. v Latham, 59 NY2d 231, 238). However, constructive notice may be found where an out-of-possession landlord reserves a right under the terms of a lease to enter the premises for the purpose of inspection and maintenance or repair and a specific statutory violation exists (Guzman v Haven Plaza Hous. Dev. Fund Co., 69 NY2d 559, 566; Worth Distribs. v Latham, supra; see also, Santiago v Port Auth., 203 AD2d 217, lv denied 84 NY2d 807; Levy v Daitz, 196 AD2d 454). In such case, **only a significant structural or design defect that is contrary to a specific statutory safety provision will support imposition of liability against the landlord.** [emphasis added]

Velazquez v. Tyler Graphics, 214 A.D.2d 489 (1st Dept. 1995). See Quinones v. 27 Third City King Restaurant, 198 A.D.2d 23 (1st Dept. 1993).

In the case at bar, Plaintiff fails to establish that there were violations of any specific statutory safety provisions, within the meaning of the aforesaid applicable law. Rather, in a cursory fashion, invokes only NYC Administrative Code §§ 27-127, 27-128, and 27-370, (See Plaintiff's Counsel's Affirmation, p. 14-15. See Plaintiff's Bill of Particulars, p. 9), without citing to any related case law, or

¹² (See Lease).

¹³ (GIBCO EBT, p. 31).

including any expert affidavit, in this regard.

As far as NYC Administrative Code §27-127 “Maintenance requirements”¹⁴, and §27-128 “Owner responsibility”¹⁵, the First Department has determined that these are not “specific” statutory violations, but merely “general” safety provisions, even where Plaintiff alleged that a potential engineer witness would testify that §27-127 and §27-128 were violated. Boateng v. Four Plus Corp., 22 A.D.3d 322 (1st Dept. 2005). It has been repeatedly held that the NYC Administrative Code §§ 27-127, and 27-128, fail to “offer an independent basis of liability.” Mansfield v. Dolcemascolo, 34 A.D.3d 763, 764 (2d Dept. 2006).

As far as NYC Administrative Code §27-370, “Exit Passageways”, this section is inapplicable, because the step in the instant matter is not an “exit passageway”, which is defined as a: “horizontal extension of a vertical exit, or a passage leading from a yard or court to an open exterior space.” (See NYC Administrative Code § 27-232 “Definitions”). “Exit” is defined as:

“a means of egress from the interior of a building to an open exterior space which is provided by the use of the following, either singly or in

¹⁴ NYC Administrative Code §27-127 “Maintenance requirements” provides that: “All buildings and all parts thereof shall be maintained in a safe condition. All service equipment, means of egress, devices, and safeguards that are required in a building by the provisions of this code or other applicable laws or regulations, or that were required by law when the building was erected, altered, or repaired, shall be maintained in good working order.”

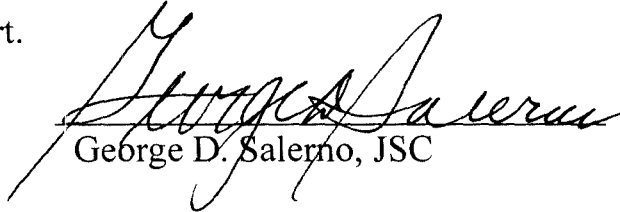
¹⁵ NYC Administrative Code §27-128 “Owner responsibility” provides: “The owner shall be responsible at all times for the safe maintenance of the building and its facilities.”

combination: exterior door openings, **vertical exits**, exit passageways, horizontal exits, interior stairs, exterior stairs, ...; **but not** including access stairs, **aisles**, corridor doors or **corridors.**" [emphasis added] (See NYC Administrative Code § 27-232 "Definitions"). The subject step did not lead to an open exterior space, within the meaning of the code. See also Maksuti v. Best Italian Pizza, 27 A.D.3d 300 (1st Dept. 2006). See also Walker v. 127 West 22nd Street, 281 A.D.2d 539 (2d Dept. 2001). It is also noted that Plaintiff never even cited NYC Administrative Code §27-370 in her Bill of Particulars.¹⁶

Where, as here, the alleged defective condition does not involve "a significant structural¹⁷ or design defect contrary to a specific statutory safety provision", [Vasquez v. The Rector, 40 A.D.3d 265 (1st Dept. 2007)] , and/or the code violations alleged are "inapplicable or [are] not the proximate cause of plaintiff's injuries", [Sauer v. Mannino, 309 A.D.2d 1053, 1054 (3d Dept. 2003)], the out-of-possession owner is entitled to "summary judgment as a matter of law dismissing the complaint as against" it. Id.

Accordingly, Defendant T.RHODES' Motion, and Defendant GIBCO's Cross Motion, are granted; and this action is dismissed. This constitutes the decision and order of this Court.

Dated: May 30, 2008


George D. Salerno, JSC

¹⁶ (See Plaintiff's Bill of Particulars, p.9, at Movant T.RHODES' Exhibit "D").

¹⁷ Also, Plaintiff failed to even establish that there was a significant structural or design defect within the meaning of the aforementioned applicable law. Plaintiff does not proffer the affidavit of an expert to address this issue; and it appears that the step "did not affect the structural integrity of the building on the premises." Vasquez, supra, at p. 266.