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

PRESENT: JUDITH J GISCHE Justice PART 10

Index Number : 110168/2004

GREENSTEIN, SARAH

VS

DON HILL ENTERTAINMENT

Sequence Number : 003

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED

MAY 06 2009

COUNTY CLERK'S OFFICE NEW YORK

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

Dated: May 5, 2009

JUDITH J GISCHE, 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: PART 10

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Sarah Greenstein and
Steven Greenstein,

Plaintiffs,

-against-

Don Hill Entertainment Inc. a/k/a
Don Hill's Nightclub, Canal on Spring
Café, Ltd., and Ponte Equities, Inc.,

Defendants.

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DECISION/ORDER
Index No.: 110168/04
Seq. No.: 003

Present:
Hon. Judith J. Gische, JSC

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Don Hill, Canal n/m (3212) w/JOT affirm, exhs	1
Ponte x/m (3212) w/MJR affirm, exhs exhs	2
Pltf opp (both motions) w/ MVL affirm, exhs	3
Don Hill, Canal reply w/JPT affirm	4
Ponte reply w/JCB affirm	5

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, Sarah Greenstein, at "Don Hill's Nightclub," located at 511 Greenwich Street, New York, New York ("premises"). Steven Greenstein, has asserted a derivative claim for loss of services (hereinafter both Greensteins are referred to as "plaintiff"). Issue was joined and the Note of Issue was filed May 2, 2008. The court has before it a timely motion and cross motion for summary judgment in favor of the defendants. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004). They will be decided on

the merits. The court's decision and order is as follows:

Arguments Presented

Plaintiff contends that on the evening of February 7, 2003 ("date of the accident") she was injured when a ceiling tile or part of the ceiling fell and struck her on the head, neck and shoulder while she was at the premises. Don Hill Entertainment, Inc. a/k/a Don Hill's Nightclub, Canal on Spring Street Café, Ltd. was the commercial tenant of the premises ("nightclub") and Ponte Equities, Inc. was its ("landlord" or "Ponte")

The tenant and landlord have brought separate motions for summary judgment dismissing the complaint. The defendants have cross claims against each other for contribution, indemnification, etc. Thus, while presenting similar arguments about why each of them are entitled to summary judgment, Ponte also argues that it is free from negligence, but its tenant is not.

Both defendants deny they created or had notice of a dangerous condition at the premises. Both argue that plaintiff has no idea whether she was hit by a piece of tile or an entire tile. Both deny receiving any complaints about a dangerous condition involving the ceiling. The landlord, however, argues that the tenant had actual notice of a dangerous condition at the premises, but did nothing about it.

Plaintiff was deposed by the defendants. At her deposition ("EBT") plaintiff testified she had only been at the premises a few minutes when a piece of a tile or a entire tile fell on her. According to her husband who was also deposed by the defendants, he heard a loud crash and his wife's scream. When he looked, Mr. Greenstein saw that part of the ceiling had come down and there was "a large black tile on the floor." Plaintiff contends the defendants had actual and/or constructive notice of

the dangerous condition because some tiles were already missing from the ceiling on the day of the accident. Plaintiff contends this was due to a recurring seepage of water from the roof that had loosened the tiles. For this argument, she refers to the testimony Leo Martin Sheridan, who was the Vice President of defendant Canal on Spring Street, Ltd. at the time of her accident. Sheridan testified at his EBT that prior to the date of the accident he noticed several ceiling tiles were missing, but he did not do anything about it or tell anyone. He also testified that he personally observed some of the tiles fall down. Sheridan testified that before 2003 he had complained to the landlord about water leaking into the nightclub. These leaks happened in different areas of the club, and only when it rained. Sheridan noticed a leak by the stage and also by the front door. According to Sheridan this problem began after someone erected a heavy billboard on the roof.

Plaintiff argues that the landlord was negligent because it installed a billboard on the roof which was too heavy and caused these leaks into the nightclub, thereby creating the dangerous condition (i.e. loosened and weak ceiling tiles). Plaintiff further claims the defendants had actual notice of a dangerous condition because Ponte made extensive repairs to that roof just a few months before her accident.

Plaintiff contends that even if she cannot directly prove negligence (i.e. that the defendants created or had notice of a dangerous condition), she should be allowed to do so indirectly. She asks that the court infer defendants' negligence based upon the nightclub having been sole tenant/occupant of this commercial space for several years, the tiles were within the defendants' exclusive control, the accident would not have occurred had defendants used reasonable care in maintaining their premises, and

because the nature of the accident was such that it does not happen in the absence of negligence.

Plaintiff provides the sworn affidavit of someone she contends is her expert. This person ("Kuohn") is a claims adjuster. He holds a business degree and has worked in various managerial positions involving facilities management. In his sworn affidavit, Kuohn states that he is familiar with acoustic tiles and their installation. He opines that ceiling tiles can deteriorate and become heavy if they get wet which may, in turn, cause them to fall down.

Ponte also provides the sworn of its purported expert ("Angelides"). Angelides is a licensed Professional Engineer. Although he did not perform a physical inspection of the tiles, he saw photographs of the broken tiles lying on the nightclub floor. Angelides opines that the tiles must have been dry, not wet, when they fell because they did not fall in a clump. He also states that because he cannot see any water stains on them and they are not deformed or concaved, the tiles had not absorbed water and fallen for that reason.

Discussion

A movant seeking summary judgment in its favor must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. " Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). The evidentiary proof tendered, however, must be in admissible form. Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 (1979). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324

(1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

A landowner is under a duty to maintain its property in a reasonably safe condition under existing circumstances, which includes the likelihood of injury to a third party. Perez v. Bronx Park South, 285 AD2d 402 (1st dept 2001). Tto prevail on this motion and cross motion for summary judgment, each defendant must prove that it did not create the dangerous condition alleged or did have a sufficient opportunity, within the exercise of reasonable care, to remedy the situation. *see* Gordon v. American Mus. of Nat. Hist., 67 N.Y.2d 836 (1986); Lewis v. Metropolitan Transp. Auth., 99 A.D.2d 246 (1984) *aff'd* 64 N.Y.2d 670 (1984); *see* Mercer v. City of New York, 223 A.D.2d 688, 689 (1996), aff'd 88 N.Y.2d 955 (1996). To defeat the motion, plaintiff must (once the burden shifts to her) raise a triable issue of fact as to whether defendants created the condition or had actual or constructive notice of it. Dombrower v. Maharia Realty Corp., 296 A.D.2d 353 (1st Dep't 2002).

The court first addresses plaintiff's request that the court consider the circumstantial evidence she has presented in opposition to defendants' motions. The doctrine of res ipsa loquitur is an evidentiary rule. Abbott v. Page Airways, Inc., 23 N.Y.2d 502 (1969). Usually this is a jury charge that relieves the plaintiff from having to specify how (out of the many possible causes) the defendants were negligent. Koch v. Melton Realty Corp., 52 A.D.2d 773 (1st Dept 1976) (internal citations omitted). Only rarely does the doctrine of res ipsa loquitur result in a party being granted summary judgment. Morejon v. Rais Const. Co., 7 N.Y.3d 203 (2006). For reasons that are made clearer in this decision, the court finds that neither defendant has proved it is entitled to summary judgment. Even without considering the circumstantial evidence,

plaintiff has presented issues of fact about whether the defendants created or had notice of the dangerous condition alleged. Thus, the court reserves the trial judge the issue of whether plaintiff is entitled to a charge based upon res ipsa loquitur. Morejon v. Rais Const. Co., 7 N.Y.3d 203 (2006).

Among the issues of fact for trial are the following:

Whether the landlord created a dangerous condition by erecting (or allowing to be erected) a billboard on the roof of the premises which caused a number of leaks into the nightclub and weakened the ceiling. Plaintiff has presented evidence in admissible form, that shortly after the billboard was erected, water started to leak in when it rained. The landlord made extensive roof repairs only a few months before plaintiff's accident and the tenant was given some rent concessions because of the damage done.

There is also an issue of fact whether the nightclub/tenant had notice of a dangerous condition at the premises. Although Sheridan noticed tiles missing from the ceiling and even testified at his EBT he had personally witnessed tiles falling down, he admittedly did nothing about this problem. Sheridan contends the tiles were cork and light and they "floated" down, crumbling when they fell. However, coupled with the water leaks that also existed, there is a triable issue of fact whether the tiles or portion of the ceiling that fell were water laden and, therefore, sufficiently heavy to have proximately caused the injuries alleged.

Neither expert's affidavit has raised issues of fact and the court rejects each one of them. Kuohn does not appear to be an expert, but even if he is, all his sworn affidavit states is the obvious: wet tiles are heavy. This point is not beyond the ken of the typical jury, and therefore, his opinion is not necessary. Vaglica v. Homeyer, 30

A.D.3d 587 (2nd Dep't 2006). Angeliades' sworn affidavit is somewhat more technical, but flawed because it consists of conclusions not based upon any facts in the record. Angeliades did not physically test the ceiling, but surmises, based upon a review of photographs that the tiles were dry. Furthermore, like Kuohn, Angeliades' affidavit states the obvious: dry tiles crumble and are friable. Again, this states the obvious.

Conclusion

Defendants have failed to meet their respective burdens on these motions for summary judgment. Therefore, the motion and cross motion are denied. There are triable issues of fact.

Since this case is ready for trial, plaintiff shall serve a copy of this decision on the office of Trial Support so that it can be scheduled.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
May 5, 2009

So Ordered:

Hon. Judith J. Gische, J.S.C.