

**Mannion v 915 Second Pub Inc.**

2009 NY Slip Op 31820(U)

August 11, 2009

Supreme Court, New York County

Docket Number: 107679/02

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD

PART 35

Index Number : 107679/2002

**WILLIAM MANNION**

VS.

**915 SECOND PUB INC**

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE 6/24/09

MOTION SEQ. NO. 002

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

The instant motion is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the application of defendant 915 Second Pub Inc. a/k/a Thady's Con's Bar and Restaurant, for an order, pursuant to CPLR 3212, granting summary judgment, dismissing the complaint of plaintiff William Mannion as Administrator of the Estate of James Moore, deceased, is denied; and it is further

ORDERED that counsel for defendant shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiff.

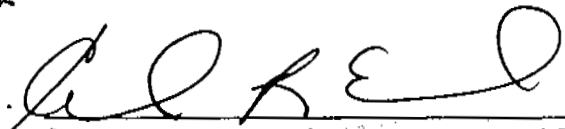
**FILED**

AUG 14 2009

COUNTY CLERK'S OFFICE

NEW YORK

Dated: 8/11/09



**HON. CAROL EDMEAD C.**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: PART 35

\_\_\_\_\_<sup>x</sup>  
 WILLIAM MANNION as Administrator of the Estate of  
 JAMES MOORE, deceased,

Plaintiff,

Index No. 107679/02

**DECISION/ORDER**

-against-

915 SECOND PUB INC. a/k/a THADY CON'S  
 BAR AND RESTAURANT,

Defendant.

\_\_\_\_\_<sup>x</sup>  
 EDMEAD, J.S.C.

**MEMORANDUM DECISION**

Defendant 915 Second Pub Inc. a/k/a Thady's Con's Bar and Restaurant ("defendant") moves for an order, pursuant to CPLR 3212, granting summary judgment, dismissing the complaint of plaintiff William Mannion ("plaintiff" and/or "Mr. Mannion") as Administrator of the Estate of James Moore, deceased ("Mr. Moore").

*Background<sup>1</sup>*

This is an action for personal injury sustained by Mr. Moore. The main injury sustained was traumatic brain damage resulting from his trip and fall on the steps leading to the men's room located in the basement of defendant's bar and restaurant.

On November 12, 2000, Mr. Moore and his friend, Lawrence Rowe ("Mr. Rowe") arrived at the defendant's pub around 8:15 p.m. They both were neighbors in the area where the pub was located and went there occasionally for a few drinks. Some time around 9:00 p.m., Mr. Rowe went down to the men's room which was located in the basement area of the pub. There were

<sup>1</sup> The facts are taken from plaintiff's complaint and affirmation in opposition.

some 15 to 20 concrete steps with metal edges. Mr. Rowe noticed that some of the steps were wet and slippery and one or two were cracked and uneven and the lighting was poor. After returning to the bar, he informed the bartender of these conditions. Mr. Rowe left the bar about 10:00 p.m., and Mr. Moore remained. Some time around 11:00 p.m., Mr. Moore tripped, lost his balance and fell down the stairs leading to the basement men's room and was severely injured with head trauma, leaving him in an unconscious condition and then a coma. Mr. Moore was removed from the scene by NYC Ambulance personnel to New York Hospital. He remained in a coma for over a month. He was treated for traumatic subarachoid and intraventricular hemorrhage. He underwent ventricular catheter placement and had a tracheostomy. After discharge from New York Hospital, he spent another month in rehabilitation at the Hospital for Joint Diseases.

*Defendant's Contentions*

There is no evidence that the defendant had actual or constructive notice of any defect, and plaintiff is speculating as to the cause of the fall.

Plaintiff has failed to set forth any admissible evidence which establishes negligence on the part of the defendant.

And, as evidenced by Mr. Mannion's testimony, he was not present when the decedent fell. Accordingly, he was not a witness.

As for the statements made by the decedent prior to his death, the same are hearsay and inadmissible.

Without the testimony of Mr. Moore, plaintiff is unable to set forth where and how the accident occurred. It is mere conjecture by plaintiff to allege a slippery substance or defective

stairway when plaintiff fails to set forth how the accident occurred.

And, in the testimony of Mr. O'Sullivan, he clearly denied any knowledge of said accident and when shown photographs of the alleged defective stairwell, he denied the same as the stairs in his premises were practically new in 2000.

There is no evidence that defendant had notice of any alleged dangerous condition. And, there is no evidence that the defendant either created said condition nor had notice of the same.

*Plaintiff's Opposition*

The step on which he tripped and fell is referred to and depicted on defendant's Exhibit A for identification at Mr. Mannion's deposition, and was also submitted to the defendant in plaintiff's Supplemental Verified Bill of Particulars. The particular step was also referred to in Mr. Mannion's deposition at pp. 34 and 41 where he testified that Mr. Moore told him which step caused him to trip and fall. Mr. Moore identified the location on the picture. This picture, as well as four others, of the stairs and surrounding area were produced by the plaintiff and marked defendant's exhibits A through E at Mr. Mannion's deposition. These pictures were provided by Mr. Rowe when he was told about the accident of Mr. Moore a week later, he went back to defendant's pub and took about 5 or 6 pictures which he gave to Mr. Moore after his discharge from the hospital and the rehabilitation center.

After Mr. Rowe notified the bartender about the conditions on the stairs that night, nothing was done. Mr. Moore's accident occurred nearly two hours after this notification. No warnings or caution signs were put in place by the stairway at the time of the accident.

The stay in this action lasted for more than two and one-half years. A month after the stay was lifted, the building housing the pub was demolished after sustaining structural damage

caused by construction at a neighboring site on December 15, 2005. Under these circumstances, plaintiff did not have an opportunity for a physical examination of the staircase involved in the accident by an expert. Therefore, plaintiff is relying on the photographs taken by Mr. Rowe to show the condition of the steps at the time of the accident.

Plaintiff is also relying on the deposition testimony of Mr. Doyle who provides the reason why the basement steps at defendant's pub were in a defective and dangerous condition on the night of Mr. Moore's accident. Mr. Doyle describes the heavy traffic on these steps because nearly all deliveries to the bar ended up in the basement by way of this stairway. The kitchen and the walk-in refrigerator were located there as well.

*Defendant's Reply*

In the opposition to this motion, plaintiff is still unable to identify what caused Mr. Moore's accident. It is mere conjecture on plaintiff's behalf as to which step Mr. Moore fell from and what caused his fall.

And, mere speculation may not overcome defendant's entitlement to summary judgment.

Analysis

Notice: Actual and Constructive

"It is well settled that in order for a landlord to be held liable for injuries resulting from a defective condition upon the premises, the plaintiff must establish that the landlord had actual or constructive notice of the condition for such a period of time that, in the exercise of reasonable care, it should have been corrected" (*Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 646, 649 NYS2d 115 [citations omitted]; *see Lupi v Home Creators*, 265 AD2d 653, 696 NYS2d 291, *lv. denied* 94 NY2d 758, 705 NYS2d 5).

To constitute constructive notice, a dangerous condition must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy the condition (*see Gordon v. American Museum of Natural History*, 67 NY2d 836, *supra*; *see also Segretti*, 256 AD2d 234, *supra*; *Lemonda v. Sutton*, 268 AD2d 383, 702 NYS2d 275 [1<sup>st</sup> Dept. 2000]; *Gutierrez v. Lenox Hill Neighborhood House, Inc.*, 4 AD3d 138, 771 NYS2d 513 [1<sup>st</sup> Dept. 2004]; *Budd v. Gotham House Owners Corp.*, 17 AD3d 122, 793 NYS2d 340 [1<sup>st</sup> Dept. 2005]). A defendant/property owner may also have constructive notice of a dangerous condition if the plaintiff presents evidence that the condition was ongoing and recurring in the area of the accident, and such condition was left unaddressed (*see Gordon v. American Museum of Natural History*, 67 NY2d 836, *supra*; *see also O'Connor-Miele v. Barhite & Holzinger, Inc.*, 234 AD2d 106, 650 NYS2d 717 [1<sup>st</sup> Dept. 1996]; *Colt*, 209 AD2d 294, *supra*). By contrast, a mere general awareness of the presence of some dangerous condition is legally insufficient to establish constructive notice (*see Piacquadio v. Recine Realty Corp.*, 84 NY2d 967, 622 NYS2d 493 [1994]; *see also Gordon v. American Museum of Natural History*, 67 NY2d 836, *supra*; *Segretti*, 256 AD2d 234, *supra*).

#### Duty of Care

"Negligence consists of a breach of a duty of care owed to another" (*Di Cerbo by DiCerbo v Raab*, 132 AD2d 763, 764, 516 NYS2d 995 [3d Dept 1987]). It is axiomatic that, to establish a case of negligence, plaintiff must prove that the defendants owed her a duty of care, and breached that duty, and that the breach proximately caused the plaintiff's injury (*see Solomon by Solomon v City of New York*, 66 NY2d 1026, 1027, 499 NYS2d 392 [1985]; *Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301, 302, 724 NYS2d 34 [1st Dept 2001]). Absent a

duty of care to the injured party, a defendant cannot be held liable in negligence (*Palsgraf v Long Island R.R. Co.*, 248 NY 339 [1928]). The question of whether a duty of care exists is one for the court to decide. *De Angelis v Lutheran Med. Ctr.*, 58 NY2d 1053, 462 NYS2d 626 [1983]; *Stankowski v Kim*, 286 AD2d 282, 730 NYS2d 288 [1<sup>st</sup> Dept], *lv. dismissed* 97 NY2d 677, 738 NYS2d 292 [2001]).

Defendant's motion for summary judgment is denied.

Defendant failed to make a *prima facie* showing of entitlement to judgment as a matter of law ( *see generally Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985] ). Mr. Rowe testified at his deposition that went down to the men's room which was located in the basement area of the pub. There were some 15 to 20 concrete steps with metal edges. Mr. Rowe noticed that some of the steps were wet and slippery and one or two were cracked and uneven and the lighting was poor. After returning to the bar, he informed the bartender of these conditions. After Mr. Rowe notified the bartender about the conditions on the stairs that night, nothing was done. Mr. Moore's accident occurred nearly two hours after this notification. No warnings or caution signs were put in place by the stairway at the time of the accident. This testimony is not sufficiently refuted to establish defendant's entitlement to summary judgment. This court finds that Mr. Rowe's complaint about the condition of the stairs some two hours before Mr. Moore's accident was sufficiently related to the alleged defect that injured Mr. Moore to allow the issue of notice to go to the jury *see Paz v Trump Plaza Hotel & Casino*, 28 A.D.3d 212, 213, 812 N.Y.S.2d 82 [2006] ).

It is also noteworthy that defendant failed to produce any admissible evidence which indicates when the stairway was last cleaned or inspected prior to the accident, or in fact, any

maintenance evidence.

Although defendant is right in stating that Mr. Mannion was not present when the decedent fell, and that Mr. Mannion was not a witness, Mr. Mannion does raise an issue of fact concerning whether defendant had sufficient notice to remedy the alleged condition so as to allow this case to proceed to trial.

And, the credibility of Mr. Rowe and Mr. O'Sullivan can be put before the jury.

As to defendant's argument that the statements made by the decedent prior to his death, are hearsay and inadmissible, evidence otherwise excludable at trial may be considered in opposition to a motion for summary judgment as long as it does not become the sole basis for the court's determination. *See Matter of New York City Asbestos Litig.*, 7 A.D.3d 285, 286, 776 N.Y.S.2d 253 [2004]; *Navedo v 250 Willis Ave. Supermarket*, 290 AD2d 246, 247 [2002]).

In the instant case, plaintiff has presented sufficient evidence, not all of which is hearsay, to warrant a trial.

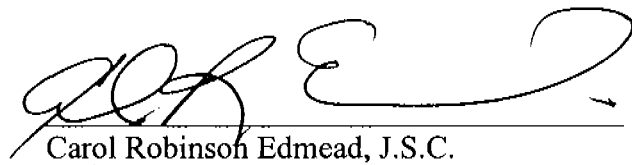
#### Conclusion

Based on the foregoing, it is hereby

ORDERED that the application of defendant 915 Second Pub Inc. a/k/a Thady's Con's Bar and Restaurant, for an order, pursuant to CPLR 3212, granting summary judgment, dismissing the complaint of plaintiff William Mannion as Administrator of the Estate of James Moore, deceased, is denied; and it is further

ORDERED that counsel for defendant shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiff.

Dated: August 11, 2009



Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMED**

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