

**Dougherty v Allen House, LLC**

2009 NY Slip Op 32374(U)

October 15, 2009

Supreme Court, New York County

Docket Number: 106548/2007

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

*Justice*

Index Number : 106548/2007  
**DOUGHERTY, COURTNEY**  
 VS.  
**ALLEN HOUSE**  
 SEQUENCE NUMBER : 005  
 SUMMARY JUDGMENT

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

MOTION DATE 10/09/09

MOTION SEQ. NO. 005

MOTION CAL. NO. \_\_\_\_\_

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

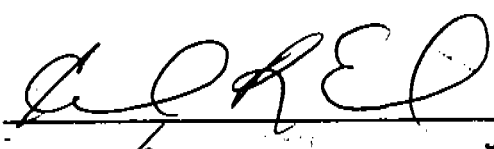
The instant motion is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the motion of defendants DMD Restaurant, Inc. d/b/a Martignetti Liquors and Allen House, LLC for an Order pursuant to CPLR 3212, granting summary judgment dismissing the complaint of plaintiff Courtney Dougherty is denied; and it is further

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

**FILED**  
 OCT 16 2009  
 COUNTY CLERK'S OFFICE  
 NEW YORK

Dated: 10/15/09

  
 J.S.C.

**HON. CAROL EDMEAD**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

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

\_\_\_\_\_  
COURTNEY DOUGHERTY,

Plaintiff,

-against-

ALLEN HOUSE, LLC and MARTIGNETTI  
LIQUORS,

Defendants.  
\_\_\_\_\_

EDMEAD, J.S.C.

Index No. 106548/2007

**DECISION/ORDER**

**FILED**  
OCT 16 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

**MEMORANDUM DECISION**

Defendants DMD Restaurant, Inc. d/b/a Martignetti Liquors ("Martignetti Liquors") and Allen House, LLC ("Allen House") (collectively "defendants"), move for an Order pursuant to CPLR 3212, granting summary judgment dismissing the complaint of plaintiff Courtney Dougherty ("plaintiff").

This is an action to recover damages for personal injuries suffered by the plaintiff as a result of an accident that occurred on October 1, 2005 at 159 East Houston Street, New York, New York (the "subject premises").

*Defendants' Contentions*

Mr. Martignetti in his affidavit argues that he or his brother (the two owners), would have been on duty the evening of plaintiff's alleged accident. Neither of them had any knowledge of any broken glass on the floor of Martignetti Liquors on or about October 1, 2005. And, no Martignetti Liquors employee who was on duty that evening informed Mr. Martignetti that there was any broken glass on the floor. Further, the custom and habit of Martignetti Liquors was that if any employee was made aware of the presence of any foreign substance on the floor, it would

be immediately cleaned up. To the best of Mr. Martignetti's knowledge, there is no reason why these normal procedures would not have been followed that evening.

And, plaintiff in her deposition admits that she has no knowledge as to how long the glass was there or how it got there. And, at no time before she hurt her foot that evening did she see any glass or any other foreign materials on the floor. Notwithstanding the fact that Robert Hagedorn ("Mr. Hagedorn") testified at deposition that there was glass on the floor prior to the incident, approximately 45 minutes before he became aware of plaintiff's accident, his testimony does not establish that anyone at Martignetti Liquors had any knowledge of this condition.

Plaintiff is unable to establish that defendant Martignetti Liquors had notice of the glass condition or that they created the alleged condition.

As to defendant Allen House, it is no more than an absentee landlord, and is not involved in any way with running the business.

*Plaintiff's Opposition*

That defendants did not have any knowledge of the condition of the floor where the accident occurred on the date of the accident is insufficient to entitle defendants to summary judgment. Mr. Hagedorn establishes that the glass condition existed about 45 minutes before plaintiff's accident.

Mr. Martignetti had no knowledge of any of the events that unfolded on the night of plaintiff's accident or knowledge about the condition of the floor of the bar.

Defendants have failed to meet their burden of establishing that the glass in question was not present for a sufficient period of time prior to this accident such that they should have discovered and remedied same.

And, general practice is insufficient proof to establish entitlement to summary judgment. In fact, based on Mr. Martignetti's deposition testimony, he cannot even confirm that he was present at the bar on the date of plaintiff's accident. Furthermore, he fails to provide any information about inspection of the area where the broken glass was located immediately prior to plaintiff's accident, and no information about the specific activities of specific employees in maintaining the floor on the date of plaintiff's accident.

As to defendant Allen House, a premises owner has a non-delegable duty to maintain its premises in a reasonable and safe condition.

*Discussion*

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390 [U] [Sup Ct New York County, 2003]). Thus, the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlblinder*, 307 AD2d 230, 762 NYS2d 386 [1<sup>st</sup> Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1<sup>st</sup> Dept 2002]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172

[\* 5]  
[1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman, supra* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1<sup>st</sup> Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

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).

\* 6]

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

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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]).

In the instant case, the direct proof that the broken glass condition was present on the defendants' floor for the entire time period that the plaintiff was present at the bar, to wit, a total of approximately forty-five minutes to one hour, is established through the sworn testimony of the non-party Robert Hagedorn. Mr. Hagedorn testified at his deposition that:

[He] saw the glass when [he] first walked into the bar because [he] felt it when [he] was walking, felt like [he] was walking atop of peanuts cracking. When [he] was walking towards the back, [he] was stepping on it like – like, felt like popcorn. [He] noticed there was glass on the floor. [pp. 17-18]

He knew it was glass because he looked down and saw it [p. 19]. And, Mr. Hagedorn's testimony was that when he walked into the bar, the glass had already been crushed into small pieces [p. 20], implying that it had been there for quite some time.

Defendants' evidence established that they did not have actual notice of the hazard ( *see Campanella v Marstan Pizza Corp.*, 280 A.D.2d 418, 418 [2001] ). Furthermore, defendant Martignetti described its usual custom and habit that if any employee was made aware of the presence of any foreign substance on the floor, it would be immediately cleaned up. But did not indicate what such procedures were followed on the day of the accident. Further, defendant Martignetti failed to provide any information about inspection of the area where the broken glass was located immediately prior to plaintiff's accident, and no information about the specific

\* 8]

activities of specific employees in maintaining the floor on the date of plaintiff's accident. Thus, there is a question of fact on whether defendant Martignetti had constructive notice of the complained of condition ( *see Moser v. BP/CG Ctr. I, LLC*, 56 AD3d 323, 324 [2008], citing, inter alia, *Baptiste v. 1626 Meat Corp.*, 45 AD3d 259 [2007] ).

With respect to defendant Allen House, an out-of-possession landlord is not liable for injuries that occur on its premises unless the landlord retains control over the premises or is contractually bound to repair unsafe conditions ( *see Scott v Bergstol*, 11 A.D.3d 525, 525, 782 N.Y.S.2d 793). Control may be evidenced by lease provisions making the landlord responsible for repairs or by a course of conduct demonstrating that the landlord has assumed responsibility to maintain a particular portion of the premises ( *see Winby v Kustas*, 7 A.D.3d 615, 615, 775 N.Y.S.2d 906; *Gelardo v. ASTHMA Realty Corp.*, 137 A.D.2d 787, 788, 525 N.Y.S.2d 334). The defendant Allen House failed to establish that it lacked control over the premises. Thus, to establish its entitlement to judgment as a matter of law, defendant Allen House was required to show that it did not cause the condition and had no actual or constructive notice of the alleged condition in reasonably sufficient time to remedy it ( *see Danielson v Jameco Operating Corp.*, 20 A.D.3d 446, 448, 800 N.Y.S.2d 421; *Park v Caesar Chemists*, 245 A.D.2d 425, 426, 666 N.Y.S.2d 679). In the instant case, there is no affidavit from Allen House, no lease submitted establishing that it is an out-of-possession landlord. Defendants only rely on the statement not from Allen House but from Mr. Martignetti that Allen House is nothing more than the landlord of the building and is not involved in any way in the running of business or maintenance of any type. It is merely an out of possession landlord. As defendants failed to meet their *prima facie* obligation to establish that Allen House is an out-of-possession landlord, the burden never

shifted to plaintiff to refute these claims. Therefore, defendants' motion for summary judgment as to defendant Allen House is, likewise, denied.

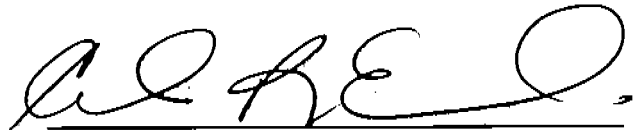
Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of defendants DMD Restaurant, Inc. d/b/a Martignetti Liquors and Allen House, LLC for an Order pursuant to CPLR 3212, granting summary judgment dismissing the complaint of plaintiff Courtney Dougherty is denied; and it is further

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

Dated: October 15, 2009



Carol Robinson Edmead, J.S..C.  
**HON. CAROL EDMEAD**

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