

Dietz v S.K.V., Inc.

2009 NY Slip Op 32703(U)

November 4, 2009

Supreme Court, New York County

Docket Number: 108309/07

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

ANNY C. DIETZ and JOHN P. DIETZ,
Plaintiffs,

Index No.: 108309/07

Motion Date: 03/17/09

- v -

Motion Seq. No.: 02

S.K.V., INC. Individually and d/b/a
LA HOUPPA RISTORANTE and
MADISON/64TH PROPERTIES, LLC.,

Motion Cal. No.: 28

Defendants.

The following papers, numbered 1 to 4 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits Exhibits
Answering Affidavits - Exhibits
Replying Affidavits - Exhibits

PAPERS NUMBERED

1

2, 3

4

FILED
NOV 18 2009
NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers,

Defendants move for summary judgment on separate motions in this trip and fall personal injury action.

Plaintiff Anny Dietz sues for injuries sustained as a result of slipping on steps outside of defendant S.K.V.'s (SKV) restaurant on April 4, 2007. Defendant Madison/64th Properties is the owner of the subject premises and leases the space to SKV. The premises is in a landmarked district on the Upper East Side of Manhattan. It was raining at the time of the accident and plaintiff argues that the stairs were in a dangerous condition

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

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check If appropriate: DO NOT POST REFERENCE

because there was no handrail and because the steps were pitched forward excessively.

Defendants argue that they are entitled to summary judgment because the Building Code section relied upon by plaintiff with regard to the requirement for handrails on exterior staircases, Administrative Code of the City of New York §27-376, does not apply to the staircase at issue here. The court agrees with defendants that the inapplicability of this Code section subjects plaintiff's claims to summary dismissal. As the Court has held, "[h]ere, the subject staircase, which was outside the parameters of the building, did not provide a means of egress from the interior of the building to an open exterior space. Considered otherwise, the front door of the building served as the exit to the open exterior space, namely, the platform in front of the door. Obviously, if the stairs are not an exit, by definition they do not fall within the ambit of section 27-376." Gaston v New York City Housing Authority, 258 AD2d 220, 224 (1st Dept 1999).

Here, neither the series of five cement stairs that are closed off by a gate at the building line nor the stair beyond the tiled surface in the design of a mosaic circle, which is located in an atrium in front of the door to the restaurant, provide a means of egress from the interior of the building to an open exterior space. Instead the door to the restaurant

constitutes the required exit. As they do not provide a means of egress from the interior of the building to an open exterior space, the stairs where plaintiff alleges she was injured, fall outside the ambit of section 27-376. The configuration of the stairs in the action before this court are the same as those in Gaston, and since they do not constitute an exit, the exit being the door to the restaurant, this court agrees with defendants that section 27-376 is inapplicable.

Nor are Administrative Code §§ 27-127 and 27-375 applicable to the stairs in question here. As held in Gaston, those sections apply to interior staircases. The Gaston court stated that

That section defines an interior stair as '[a] stair within a building, that serves as a required exit.' An exit, in turn, is defined as '[a] means of egress from the interior of a building to an open exterior space which is provided by ... interior stairs [or] exterior stairs.' Finally, exterior stair is defined as '[a] stair open to the outdoor air, that serves as a required exit.'

Gaston, 258 AD2d at 221.

On that basis, Nameny v East New York Savings Bank, 267 AD2d 108 (1st Dept 1999), wherein the court ruled that the Supreme Court erred in granting defendants summary judgment, does not support plaintiff's position. The Nameny court, in holding Administrative Code §§ 27-127 and 27-375 applicable to the facts, implicitly found that the stairs leading from the sidewalk to the basement where the plaintiff Nameny, who was delivering food supplies, fell, constituted interior stairs. Searching the

record in this case, it is clear that none of the stairs involved in this case were section 27-375 interior staircases.

The statement of plaintiff's expert that the geometry of the stairs violated the Building Code is belied by the Certificate of Occupancy dated January 7, 1993 that is appended to plaintiff's papers that states "Conforms substantially to the approved plans and specifications and to the requirements of all applicable laws, rules, and regulations for the use and occupancies specified herein." See Ragusa v Lincoln Center for the Performing Arts, Inc., 39 AD3d 294 (1st Dept 2007).

Likewise, defendants demonstrate that there is an absence of any evidence of common law negligence, which is fatal to plaintiff's complaint. The decision in Wilson v Proctors Theater & Arts Center & Theater of Schenectady, Inc., 223 AD2d 826, 828 (3d Dept 1996) is not to the contrary. In affirming the trial court's denial of summary dismissal of the complaint, the third department stated that

The disposition of this appeal does not, however, turn on whether the Code applies, for plaintiffs' proof sets forth common-law negligence claims premised on the existence of a dangerous condition, of which defendant allegedly was, or should have been, aware. (Citations omitted). Defendant's submissions simply do not make out a prima facie case for judgment in its favor on those claims. . .

Defendant has not established that the lighting in the area was actually turned on at the time of the accident, let alone that it was adequate for safe traversal of the stairs; that the stairway was otherwise safe; that plaintiff's fall was solely the result of her own culpable conduct; or that it had no notice of the assertedly unsafe conditions in the stairway area. In support of its motion, defendant relies on

. . . conclusory statements. Furthermore, even assuming that defendant is correct in its assertion that [it] is exempt from the requirements of the Code, that fact, without more, would not absolve it of liability for common-law negligence, even if the negligence charged consists of the failure to remedy, or warn of, a dangerous condition arising from a construction or design defect." (Citations omitted). Id. at 828 -829.

Unlike Wilson, in this case, there is no allegation that the stairs were inadequately illuminated. The facts of Nameny are likewise distinguishable as there the "plaintiff submitted expert testimony that the stairs, which were made of wood, were visibly deteriorated". Ibid, 267 AD2d 108-109. Plaintiff does not contend that the condition of the stairs were deteriorated or wobbly, as the Nameny plaintiff contended. Therefore, this case is similar to the facts presented to the court in DeRosa v. City of New York (3 AD3d 323, 325-326 [1st Dept 2006]), where the Court dismissed a case concerning a trip and fall on a staircase on the grounds that defendants had no notice of any dangerous condition in addition to the fact that compliance with the Code was not required. See also Burke v. Canyon Road Restaurant, 60 AD3d 558 (1st Dept 2009). The record before the court contains no evidence that defendants breached any duty owed to plaintiff with respect to the condition of the staircase.

Neither SKV's witness deposition testimony nor its interrogatory responses indicating that the restaurant placed a handrail and skid proof tape along the step leading into the restaurant, below the site of the accident, are of any moment.

The alleged installation and subsequent removal of handrails from any of the staircases involved here create no duty on the part of defendants to keep handrails in place at such location, where none are otherwise required by the Code.

Finally, the claims of defendant Madison/64th Properties for common law and contractual indemnification against co-defendant SKV are summarily dismissed as moot. In addition, defendant Madison/64th Properties cannot prevail on such claims because the indemnification clauses contained in Sections 8 and 44 only apply where liability occurs within the bounds of the leased premises or where the lessee-restaurant created the condition. Section 4 of the lease provides that the owner shall maintain public portions of the building and that the tenant was only permitted to obtain consent for non-structural alterations. The evidence that SKV applied tiles to the face of the steps of the stairwell and installed a handrail outside its premises triggers neither common law nor contractual indemnification since neither activity created a dangerous condition.

In accordance with the foregoing, it is

ORDERED that the defendants' motion for summary judgment is dismissing the Complaint is GRANTED; and it is further

ORDERED that the defendant Madison/64th Properties' motion for judgment on its cross-claims is DENIED and searching the record, such cross-claims are DISMISSED; and it is further

ORDERED that the clerk shall enter judgment accordingly.

This is the decision and order of the court.

Dated: November 4, 2009

ENTER:

~~Richard A. James~~
J.S.C.

DEBRA A. JAMES

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