

<b>Bernisky v JEC II, LLC</b>
2010 NY Slip Op 30330(U)
February 11, 2010
Supreme Court, New York County
Docket Number: 101098/2007
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JUDITH J. GISCHE

PRESENT: \_\_\_\_\_

PART 10

*Justice*

Index Number : 101098/2007

**BERNISKY, JOSEPH**

VS.

**JEC II, LLC**

SEQUENCE NUMBER : 004

SUMMARY JUDGMENT

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

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 004

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

*be denied w/o oral argument*

MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION

*Status conf 3/18/2010 @ 9:30*  
**FILED**

FEB 18 2010

NEW YORK  
COUNTY CLERK'S OFFICE

**FEB 11 2010**

Dated: \_\_\_\_\_

*[Signature]*  
HON. JUDITH J. GISCHE J.S.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: IAS PART 10**

-----X  
Joseph Bernisky,

Plaintiff (s),

**-against-**

JEC II, LLC d/b/a One Little West 12 and/or  
"One" and/or "Club One," West Village, LLC and  
Meyerson Associates, Inc.,

Defendant (s).  
-----X

**DECISION/ ORDER**

Index No.: 101098-2007

Seq. No.: 004

**PRESENT:**

Hon. Judith J. Gische

**J.S.C.**

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

<b>Papers</b>	<b>Numbered</b>
Def Meyerson n/m (3212) w/ERF affirm, exhs (sep back) . . . . .	1,2
Defs JEC II and West Village n/m (3212) w/AMB affirm, exhs . . . . .	3
Def Meyerson reply and partial opp w/ERF affirm . . . . .	4
Pltf-pro se opp w/exhs . . . . .	5
Pltf opp w/MV affirm, JB and PP affids, exhs . . . . .	6
Def Meyerson reply w/ERF affirm . . . . .	7
Def JEC reply w/AMB affirm, exhs . . . . .	8
Steno minutes 10/8/09 . . . . .	9

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

**GISCHE J.:**

Plaintiff Joseph Bernisky ("Bernisky") alleges he sustained personal injuries as a result of defendants' negligence. Defendant Meyerson Associates, Inc. ("Meyerson") seeks summary judgment dismissing the complaint and all cross claims against it.

Defendants JEC II d/b/a One Little West 12 and/or "One" and/or "Club One," (hereinafter "Club One") and West Village, LLC (hereinafter "owner") have cross moved

for summary judgment dismissing the complaint and all cross claims against it as well.

Although Bernisky was briefly self represented after his former attorney moved to be relieved, plaintiff is now represented by new counsel. Thus, not only did plaintiff interpose papers while self represented, the court adjourned this matter so his new attorney could substantively oppose each motion.

Since issue was joined by the moving defendants and these motions are brought before the filing of the note of issue, they will be addressed on the merits.

The court's decision and order is as follows:

### **Arguments**

Bernisky claims he was injured on May 15, 2005 at 1:45 a.m. while at Club One. Club One is located at located at 2-8 9<sup>th</sup> Avenue, New York, New York. That building is owned by defendant West Village, LLC ("owner"). According to Bernisky's complaint and his deposition testimony, Bernisky was standing with his back to the VIP area of Club One when someone punched him on the back of his head. Bernisky lost his footing and as he struggled to regain it, he felt his foot slip off the single step leading up to the VIP lounge from the main floor of the bar. When he fell he hit the back of his head. As he lay on the floor, he noticed it was wet. He could not tell what the substance was, but it smelled bad. The wetness was not a puddle, but moisture. When Bernisky stood up, his clothing was wet.

In a sworn affidavit, Bernisky states that he slipped down the single step because it was dark he did not see it in time. He states that he tried to grab onto something as he fell, but there was nothing for him to grab a hold of.

Based upon these claims Bernisky has asserted the following five causes of

action:

The first cause of action is against Club One and the owner; it is for premises liability, based upon these defendants not maintaining the premises in a safe, proper and secure manner, in good repair and free from defect.

The second and third causes of action against Club One and Meyerson are for negligent security, the fourth cause of action against Club One and Meyerson is that the defendants failure to warn plaintiff of the "violent and dangerous propensities of its patrons" and failed to properly train its staff.

The fifth cause of action is against Club One and the owner and is under the dram shop act, alleging that the person who attacked him was served alcohol although visibly intoxicated. Neither Club One nor the owner seek summary judgment on this cause of action

Meyerson contends that although it provided security at Club One, it was not responsible for maintaining the premises in a safe condition or providing janitorial services. Meyerson relies on Bernisky's deposition testimony that he lost his footing, slipped on the step leading up and down from the VIP lounge. James Callahan, the supervisor of security for Meyerson, testified that there was security in the club on the night of the accident and no incidents were reported of violence. The security staff responded when Bernisky fell and after investigating the situation, the men at the table behind Bernisky were escorted out of the club. Callahan testified that no one, including Bernisky, complained about feeling unsafe or reported any patron acting in a threatening or belligerent manner.

Club One and West adopt and incorporate many of Meyerson's arguments.

They argue that they hired security to keep order at the club, but are not insurers of anyone's safety. Club One and West argue that the actions of the person who punched plaintiff was unforeseeable because there were no words exchanged before it happened.

Club One and West deny that there was a dangerous condition at the club. Club One denies the floor was wet or that anyone had been "constantly mopping the floors" that night to pick up spills, as Bernisky testified at his EBT. Daniel Bernstein testified for Club One that there are bus boys who are assigned to mop up any spills, and the step is one of the places they always monitor.

West separately argues that it is an out of possession landlord and has no control over the internal operations of the club. It did not have any personnel present at the club on the morning of the accident.

In opposition to these motions, Bernisky argues that there are factual disputes to be decided at trial, including whether the step where he fell violates any section of the building code. Bernisky's friend ("Hennessy"), who was with him the night of the accident, provides a sworn affidavit that area where Bernisky was standing was dark. Hennessy observed some men behind plaintiff acting out in a belligerent manner and shouting. He also observed a bald man hit Bernisky on the back of the head. When Bernisky was hit, he fell. According to Hennessy, the step was dark and hard to see.

Bernisky also relies upon the sworn affidavit of Peter Pomerantz, an engineer who he has retained as his trial expert. Pomerantz went to the premises and inspected the area where the incident occurred. Pomerantz states that there is 27 inch wide step leading up to the VIP lounge with a 5.75 inch riser. He inspected the step when the

light in the club was dimmed down and he observed that there were no lights on the riser which made the step difficult to see. Pomerantz also observed that someone falling or slipping down that step had nothing to grab onto to stop his or her fall because there is no handrail. There is seating adjacent to the step, but it is low and difficult to grab onto in an emergency.

Pomerantz identifies several building code provisions that he believes were violated, including the following: §26-207 "requirement of permit for alterations," §26-228 "general safety requirements," §27-127 "maintenance requirements," §27-128 "owner responsibility," § 27-532 [7][g] "gradients and steppings," and §27-537 "changes in level." Section 27-532 pertains to "aisles and cross aisles." Subsection [7] pertains to "aisle gradients and steppings" and subsection [g] requires that "each step in an aisle shall be marked along its nosing with a permanent contrasting color stripe, and shall be provided with a step light." Section 27-537, entitled "Exit Passageways" provides at subsection [b] that "changes in level requiring less than three risers in an exit passageway shall be by a ramp having a slope not greater than one in ten."

In reply, Club One and the owner deny that any of the codes cited by Pomerantz are applicable or raise triable issues of fact. They argue that three of the code provisions plaintiff's expert relies on (§§ 26-228, 27-127 and 27-128) were repealed effective July 1, 2008 and, therefore, those sections are wholly inapplicable to the facts of this case. They also contend the step where the incident occurred is not used as an exit passageway, as Pomerantz states, but the single step is simply an access stair. These arguments are all contained in the attorney affirmation of Club One and the owner. Those terms are defined in the building code as follows:

**"Exit Passageway.** A horizontal extension of a vertical exit, or a passage leading from a yard or court to an open exterior space."

**"Access Stair.** A stair between two floors, which does not serve as a required exit (see Exterior Stair and Interior Stair.)"

### 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]).

#### *Negligent Security Claims*

The owner of a public establishment has no duty to protect its patrons from unforeseeable and unexpected assaults nor to take any protective measures unless there was a foreseeable risk of harm from criminal activities of third persons on the premises (Rivera v. 21st Century Restaurant, Inc., 199 A.D.2d 14 [1<sup>st</sup> Dept 1993]).

Bernisky's own testimony is that he was just standing in the VIP area when, for no apparent reason, and as a complete surprise to him, someone punched on the back of the head. He does not know who hit him or why or even whether he was the intended target of the person doing the punching. Hennessy's affidavit is that Bernisky was not facing the lounge when someone randomly hit him on the back of the head.

Myerson and Club One have each proved that they are not liable to Bernisky for failing to prevent the assault. They owed Bernisky no duty to protect him from an unforeseeable and unexpected assault by another patron (Naposki v. Au Bar, 271 AD2d 371 [1<sup>st</sup> Dept 2000]). General claims in the complaint, that security personnel was poorly trained, or that the bar should have disclosed the “known propensities” of its propensities for violence, are offered without any facts. In opposition, plaintiff has failed to raise any triable factual dispute that there was a foreseeable risk of harm to him from the criminal activities of third persons on the premises (Naposki v. Au Bar, *supra.*; Rivera v. 21st Century Restaurant, Inc; *supra.*). Hennessy's statement, that some men were acting belligerently is not sufficient to raise a triable issue of fact. Therefore, the negligent security, negligent training, and failure to warn of “dangerous propensities” claims against any of the defendants are hereby severed and dismissed.

#### *Unsafe Premises Claims*

1) code violations

The possessor of land 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 [1<sup>st</sup> Dept 2001]). To prevail on their motion and cross motion for summary judgment, Club One and the owner must each separately 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 him) 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 [1<sup>st</sup> Dep't 2002]).

The owner has established that it is an out of possession landlord. No representative of the owner was present at Club One when the incident occurred and the landlord was not present to correct or address the dangerous condition alleged, which is water on the step. However, Bernisky contends the step itself is a dangerous condition and maintained in violation of the building code.

On a motion for summary judgment, it is for the court to decide issues of law that are raised (Hindes v. Weisz, 303 A.D.2d 459 [2<sup>nd</sup> Dept 2003]) and the issue of whether a particular statute, building code, or administrative code provision applies is a question of law for the court to decide (Buckholz v. Trump 767 Fifth Avenue LLC, 4 AD3d 178 [1<sup>st</sup> Dept 2004]). Club One and the owner have not proved, as a matter of law, that none of the code sections that plaintiff relies upon are applicable.

Although Club One and the owner deny that any of the cited sections apply and argue that three of them were repealed, the sections were repealed effective July 1, 2008. The incident involving Bernisky happened in March 2005. Defendants do not address this legal issue in their motion at all. Therefore the defendants have not proved that the repeal of those sections forecloses plaintiff's arguments in this case.

Nor is the court persuaded by defendants' legal interpretation of the code, that the step is not an exit passageway but simply an access stair, and therefore, the defendants did not violate the building code. The definition of access stair in the

building code is as imperfect as the definition of exit passageway when applied to the facts of this case involving a single step up into a platformed seating area or lounge. Furthermore, looking at section 27-532 [7] in its entirety, suggests that it does apply to the facts of this case, contrary to defendants' argument. Thus, the affidavit by Pomerantz raises triable issues of fact for the jury to decide. Finally, defendants' argument that the court can simply decide from photographs what kind of step this is urges the court to make a factual determination. Any factual determination, however, must be made by the trier of fact, not on a motion for summary judgment. Therefore, the motion by Club One and the owner for summary judgment dismissing the building code based claims against them is hereby denied.

2) Wet condition

The owner has established it is an out of possession landlord and, therefore, any claims by plaintiff based upon a water condition on the step or in the generally area where he was standing when he fell must be, and hereby are, dismissed against the owner. It is unrefuted that the owner was not present the day of the incident.

However, Club One has failed to prove that there was no dangerous condition in the VIP lounge or the step where Bernisky claims he slipped on something wet. Bernisky testified at his EBT that he observed a bus boy mopping the area in the VIP lounge earlier in the evening and he also testified that he slipped on the step. Upon getting up, he observed his clothing was wet and saw moisture on the floor. Although Club One contends these claims are specious, issues of credibility are for the jury to decide. Therefore, the claims against Club One having to do with a dangerous condition in the VIP lounge/step area have to be tried and the cross motion for summary

judgment on this claim is denied.

*Dram shop*

There is no motion before the court, nor does any party address, Bernisky's dram shop claims. Therefore, that claim (5<sup>th</sup> cause of action) remains to be tried as well.

*Discovery*

The plaintiff has not yet been examined by defendants' doctor. The parties agreed to stay that examination pending the court's decision on these motions. The examination of plaintiff shall take in the next thirty (30) days. The time to file the note of issue is extended to March 19, 2010. **A status conference is scheduled for March 18, 2020 at 9:30 a.m.**

**Conclusion**

In accordance with the foregoing,

*It is hereby:*

**Ordered** that the motion by defendant Meyerson Associates, Inc. dismissing all claims against it is hereby granted in its entirety; and it is further

**Ordered** that the clerk shall enter judgment in favor of defendant Meyerson Associates, Inc., against plaintiff Joseph Bernisky dismissing the complaint against Meyerson Associates, Inc., it as well as all cross claims; and it is further

**Ordered** that the cross motion by defendants JEC II, LLC d/b/a One Little West 12 and/or "One" and/or "Club One," and West Village, LLC for summary judgment dismissing the negligent security, negligent training, and dangerous propensities claims

against them is also granted; and it is further

**Ordered** that the clerk shall enter judgment in favor of defendant defendants JEC II, LLC d/b/a One Little West 12 and/or "One" and/or "Club One," and West Village, LLC against plaintiff Joseph Bernisky severing and dismissing all negligent security, negligent training, and dangerous propensities claims, as well as the cross claims against them; and it is further

**Ordered** that West Village, LLC's motion for summary judgment dismissing the complaint based upon premises negligence is granted only as to the water, etc., claims, but denied as to the building code violations, etc.; and it is further

**Ordered** that JEC II, LLC d/b/a One Little West 12 and/or "One" and/or "Club One's" motion for summary judgment dismissing the complaint based upon premises negligence (water, etc. and building code violations, etc.) is denied; and it is further

**Ordered** that the examination of plaintiff shall take in the next thirty (30) days. The time to file the note of issue is extended to March 19, 2010. **A status conference is scheduled for March 18, 2020 at 9:30;** and it is further

**Ordered** that any relief not expressly addressed is hereby denied; and it is further

**Ordered** that this constitutes the decision and order of the court.

Dated: New York, New York  
February 11, 2010

So Ordered:

Hon. Judith J. Gische, JSC

**FILED**

FEB 18 2010

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NEW YORK  
CLERK'S OFFICE