

Golden v 300 W. Park LLC

2010 NY Slip Op 30962(U)

April 12, 2010

Supreme Court, Nassau County

Docket Number: 011598/08

Judge: Michele M. Woodard

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

SCAN

-----X
ROSANNA GOLDEN,

Plaintiff,

-against-

**MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 12
Index No.: 011598/08
Motion Seq. No.: 01**

300 WEST PARK LLC, LOUCAS RESTAURANT
CORPORATION d/b/a LAUREL LUNCHEONETTE,

Defendants.

DECISION AND ORDER

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Defendants 300 West Park LLC, Loucas Restaurant Corporation d/b/a Lauren Luncheonette (referred to herein as "West Park") move for an order, pursuant to CPLR §3212, granting summary judgment dismissing Plaintiff's complaint.

Plaintiff commenced this action due to the events which occurred on June 7, 2007 at approximately 10:20 a.m. wherein she allegedly tripped and fell on an entranceway mat at Defendant's place of business. Plaintiff alleges the mat was not properly placed so as to cause a bulge to be created which in turn caused her to trip and fall.

West Park offers the deposition of Andrew Loucas (see West Park's motion, Exhibit D; the following pages refer to that exhibit). Loucas, a vice president of the corporation that owns the Laurel Luncheonette, states he never had complaints regarding the carpet/runner/mat (pg. 32); Loucas never saw the carpet/runner/mat bulge (pg. 44); there was a daily inspection of the carpet/runner/mat by Loucas and his staff (pg. 22-23). The vestibule has a tile floor, and the main floor was terrazzo, a mosaic floor or paving composed of chips of stone (pg. 14).

West Park also offered the deposition of non-party witness Barbara O'Neill (see Exhibit E annexed to West Park's motion; the following pages refer to this exhibit). Ms. O'Neill was at the premises on the date of the incident (pg. 11); Ms. O'Neill was going out into the street when Plaintiff

passed her going into the premises in a hurry (pgs. 23-24); Ms. O'Neill heard a ruckus, turned around and saw Plaintiff laying on the floor (pg. 24); Ms. O'Neill did not see what caused Plaintiff to fall (pg. 39); Ms. O'Neill states the mat was laying flat right after Plaintiff fell (pg. 40).

Plaintiff deposition is set forth as Exhibit C (annexed to West parks' motion). When Plaintiff went back to see what she fell on, she saw one carpet/runner over another and under the carpet, there was a hole in the terrazzo floor - in the tile, a defect (pgs. 54-55). Plaintiff saw a bulge after she got up from her fall (pg. 56). Plaintiff stated the carpet, after she fell, had been moved to straighten out the bulge (pg. 54).

In seeking summary judgment dismissing the complaint, the Defendant has the initial burden of establishing that it did not create the alleged dangerous condition and did not have actual or constructive notice of it (*Pelow v Tri-Main Development*, 303 AD2d 940 [4th Dept 2003]).

A landowner owes a duty to a person coming upon the land to keep it in a reasonably safe condition (*Gustin v Association of Camps Farthest Out, Inc.*, 267 AD2d 1001 [4th Dept 1999]). A reasonably safe condition takes in all circumstances, including the purpose of the person's presence on the property and the likelihood of injury (*Peralata v Henriquez*, 100 NY2d 139 [2003]; *Macey v Truman*, 70 NY2d 918 [1987]). For a landowner to be liable in tort for an injury resulting from an allegedly defective condition upon his property, the existence of a defective condition must be established (*Sadowsky v 2175 Wantagh Ave. Corp.*, 281 AD2d 407 [2d Dept 2001]).

A commercial proprietor, by his general invitation to all persons to enter the premises, represents by implication, that the means of ingress and egress are reasonably safe and free from risk, and a breach of duty in keeping them so, which is the proximate cause of an injury, renders the proprietor liable in damages (*Shirman v New York City Transit Authority*, 264 AD2d 832 [2d Dept 1999]).

Thus, the duty would include the duty of due care with regard to the inspection and maintenance of the carpets/runners/mats in West Park's premises.

Whether a condition was readily observable impacts on the Plaintiff's comparative negligence and does not negate the Defendant's duty to keep the premises reasonably safe (*Pelow v Tri-Main Development, supra*).

The fact that the condition that brought about the Plaintiff's fall could be of an open and

obvious nature does not bar a finding of liability against the Defendants as property owners, but it does go to the issue of comparative negligence (*Hogan v Bader*, 29 AD3d 740 [2d Dept 2006]; *Maloney v Wal-Mart Stores, Inc.*, 2 AD3d 508 [2d Dept 2003]; *Cupo v Karfunkel*, 1 AD3d 48 [2d Dept 2003]). Also the doctrine of the assumption of risk does not exculpate a landowner for liability of ordinary negligence in maintaining the premises (*Sykes v County of Erie*, 94 NY2d 912 [2000]).

There is deposition testimony cited previously as to the daily inspection of the property including the area where the incident occurred.

A negligent failure to discover a condition that should have been discovered can be no less of a breach of due care than a failure to respond to the actual notice of such a condition (*Blake v City of Albany*, 48 NY2d 875 [1979]).

One who undertakes to perform inspections becomes subject to a duty to perform such inspection in a non-negligent manner (*West Side Cor. v PPG Industries*, 225 AD2d 459 [1st Dept 1996]).

Here, there could be an issue of fact as to whether West Park's employees properly performed inspection of the carpet/runner/mat where the incident occurred.

This is not the case where the store manager/owner inspected the area of the mats 50 to 60 times a day or when porters swept the vestibule area three to four times each day (*see Hayden v Waldbaum, Inc.*, 63 AD3d 679 [2d Dept 2009]).

A "once daily inspection" or being stationed near the allegedly offending carpet/runner/mat Loucas' alleged location might or might not be enough.

Whether an alleged defect on a sidewalk, roadway, parking garage, carpet, mat, etc. is sufficiently hazardous to impose liability is usually a question for a jury to resolve as it involves a case-by-case basis (*Trincere v County of Suffolk*, 90 NY2d 976 [1997]) since there is no minimal dimension test (*Wiese v Town of Lancaster*, 31 AD3d 1153 [4th Dept 2000]).

Summary judgment is seldom appropriate in a negligence action (*Vanderwater v Sears*, 277 AD2d 1056 [4th Dept 2000]).

For a Defendant owner to prevail on a summary judgment motion regarding a slip and fall action, the owner is required to establish, as a matter of law, that the owner maintained the property in question in a reasonably safe condition, and that it neither created the alleged dangerous condition

existing nor had actual nor constructive notice hereof (*Mokszki v Pratt*, 13 AD3d 709 [3d Dept 2004]). Defendants have not met their burden.

While Plaintiff's ultimate burden at trial is to prove that the Defendant's conduct was the proximate cause of her injury (*see Barker v Parnossa*, 39 NY2d 926 [1976]), here the Plaintiff is required, in opposing Defendant's summary judgment motion, to raise issues of fact that Defendants created the alleged dangerous condition (under the assumption Defendants owned, controlled, possessed, etc., the parking lot in question). Here, the Plaintiff has met her burden.

West Park had two sets of mats that were cleaned every week (see Exhibit D, pg. 28 annexed to West Park's motion). Loucas purchased the luncheonette in January, 2007 (pg. 6). Plaintiff's alleged incident occurred June 7, 2007. New mats were supplied to West Park about one year after purchase since the old mats were worn (pg. 28).

Such issues as:

- With "daily inspection" and Loucas stationed near the alleged incident location (see Exhibit D, pgs. 22, 32-33 annexed to West Park's motion), should West park have rapidly resolved any bulge problems?
- Were the undersides of the mats worn? Did the change in flooring tile (smooth to coarser) cause the carpet/runner/mat to break up as Plaintiff had quickly returned to the luncheonette are material in nature?
- Did a problem with the carpet/runner/mat exist for a sufficient length of time for West Park to discover it (near the vestibule nearby Loucas' location) and remedy it?

All are issues of material fact to be decided at trial.

Although West Park notes Plaintiff had been in the West Park's luncheonette 20-30 times before the alleged incident, such repeat business might profess her pleasure with the menu, price, and/or location of West Park's establishment, not her familiarity with alleged offending carpet/runner/mat in the establishment.


Finally, credibility of witnesses, truthfulness and accuracy of testimony, whether contradicted or not, and the significance of the weakness and discrepancies are all issues for the trier of facts (*Lelekakis v Kamamis*, 41 AD3d 662 [2d Dept 2007]; *Pedone v B & B Equipment Co., Inc.*, 239 AD2d 397 [2d Dept 1997]).

Any varying accounts of the incident must be considered, evaluated and determined by the trier of facts.

As such, West Park's motion for Summary Judgment is **denied**. It is hereby **ORDERED**, that the parties are directed to appear for trial in Central Jury on June 9, 2010. This constitutes the Decision and Order of the Court.

DATED: April 12, 2010
Mineola, N.Y. 11501

ENTER:



HON. MICHELE M. WOODARD
J.S.C.

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NASSAU COUNTY
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