

Ossola v Terra Blues
2010 NY Slip Op 31094(U)
May 3, 2010
Supreme Court, New York County
Docket Number: 113904/08
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JUDITH J. GISCHE

PRESENT: _____ J.S.C. _____

PART 10

Index Number : 113904/2008

OSSOLA, PAUL

vs

TERRA BLUES

Sequence Number : 001

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

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motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

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Dated: _____

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
PAUL OSSOLA,

Plaintiff,

-against-

TERRA BLUES and DAV TSI DAV, INC.,

Defendants.
-----X

DECISION/ ORDER
Index No.: 113904/08
Seq. No.: 001

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):

Papers	Numbered
Defs' n/m (3212) w/JWS affirm, exhs	1
Pltfs' opp w/LJL affirm, PO affid, exhs	2,3
Defs' reply w/JWS affirm	4

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

This is an action by plaintiff, Paul Ossola ("Ossola"), to recover monetary damages for the personal injuries he allegedly sustained as a result of defendants' negligence. Defendant, Terra Blues is a bar located at 149 Bleecker¹ Street., 2nd floor, New York, New York. Defendant Dav Tsi Dav, Inc., is alleged to be the owner/operator of the building where the bar is located. Both defendants, who are jointly represented, have answered the complaint and now move, pursuant to CPLR § 3212, for summary judgment dismissing the complaint against them. Since issue has been joined, and the note of issue has not yet been filed, summary judgment relief is available. CPLR §

¹Identified in the complaint and motion papers as "Bleecker Street."

3212; Brill v. City of New York, 2 N.Y.3d 648 (2d Dept. 2004). The court's decision and order is as follows:

Arguments

Plaintiff is a professional musician who plays the bass. He claims that he fell off the stage at Terra Blues as a result of defendants' negligence. Defendants contend that the plaintiff cannot make a *prima facie* showing because there is no evidence establishing that defendants created or had notice of the dangerous condition alleged to have existed on the date of his accident.

Discovery is not yet complete. Plaintiff served a Verified Bill of Particulars dated March 12, 2009. Plaintiff and non-party Larry King ("King"), manager of Terra Blues, were each deposed on July 24, 2009.

Plaintiff testified at his deposition that he started performing at Terra Blues in approximately 1990 or 1991. He has never played there regularly and in the year prior to his accident, only performed at Terra Blues approximately ten times. Plaintiff testified that the stage is elevated approximately two to three feet off the floor and that he usually accessed to the stage by climbing up one step located on the side of the stage. Plaintiff stated that usually, and on the day of his accident (which took place on February 17, 2007, at approximately 3:30 a.m.), the stair was not permanently affixed to the stage and could be moved. On the date of the accident, plaintiff performed three sessions with two other musicians, commencing at approximately 10:30 p.m. and ending at approximately 3 a.m. Plaintiff stated that after the last session ended, he stepped off the stage using the step, put on his coat, put his bass in

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its case, and then stepped back on the stage using the same step so that he could say goodnight to one of the other musicians. He stated that he was on the stage for "two minutes, maybe" saying goodnight and then "turned around to leave the stage" and "fell off." Plaintiff stated that the step was not where it has previously been and although he did not see anyone move it, it had been moved. Plaintiff stated that the house lights were off but the stage was lit. He denies that the dim lighting caused his accident. He also testified at his EBT that when he fell, "there were people milling around. I think that mostly they were employees or the last hangers on at the end of a long night."

King testified at his deposition that he has been the manager of Terra Blues since 1994. He stated that the lighting control board is located behind the bar and it is controlled by him or the bartender. King testified that "somebody [plaintiff] knew walked up to the front of the stage to shake his hand. [Plaintiff] reached over to shake his hand and stepped directly off the front of the stage and fell and broke his arm. That's what I remember." King also testified that the step was not always on the same side of the stage, "sometimes it was in the front of the stage . . . to the left of the speaker, and even other times it was in the kitchen because it was easier to walk past that way. It was not always in the same spot." King stated that on the night plaintiff was injured, he does not recall where the step was located. "I just saw him fall straight forward with his hand out. His leg going off like it was going to step down on the ground, and there was no ground there."

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Discussion

Summary Judgment – Burden of Proof

The movant on a summary judgment motion has the initial burden of proving entitlement to summary judgment, by tender of evidentiary proof in admissible form sufficient to eliminate any material issues of fact from the case. Zuckerman v City of New York, 49 N.Y.2d 557, 562 (1st Dept. 1980); Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851 (1st Dept. 1985). It is only when the proponent of the motion makes a prima facie showing of entitlement to summary judgment does the burden then shift to the party opposing the motion who must then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action. Zuckerman v. City of New York, *supra* at 562. Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue of fact or where the factual issue is arguable or debatable. International Customs Assoc., Inc. v. Bristol-Meyers Squibb Co., 233 A.D.2d 161, 162 (1st Dept. 1996). Moreover, the court cannot resolve issues of credibility, as it is for the jury to weigh the evidence and draw legitimate inferences therefrom. S.J. Capelin Assocs. v Globe Mfg. Corp., 34 N.Y.2d 338 (1st Dept. 1974).

Plaintiff contends that this motion for summary judgment is premature and it would like discovery. Where a party opposed to summary judgment contends that discovery is incomplete, the court may consider whether the motion is premature because the information necessary to fully oppose the motion remains under the control of the proponent of the motion (CPLR § 3212 [f]; Lewis v. Safety Disposal System of Pennsylvania, Inc., 12 A.D.3d 324 [1st Dept. 2004]). For the reasons that follow,

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defendant's motion is not premature, and plaintiff has the information it needs to successfully defeat the motion.

Negligence

It is black letter law that a landowner or possessor has 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 A.D.2d 402 [1st Dept. 2001]). This common law duty is tempered by a requirement that a plaintiff seeking recovery must establish that the possessor of land had actual or constructive notice of the hazardous condition which precipitated the injury (Pappalardo v. Health & Racquet Club, 279 A.D.2d 134 [1st Dept. 2000]). To constitute constructive notice, a defect must be visible and apparent, and it must have existed for a sufficient length of time prior to the accident for the owner to have discovered the defect and remedied it. Pappalardo, supra.

On this motion for summary judgment, defendants have the burden of proving its defenses. Thus, defendants must prove that it did not create the dangerous condition alleged nor did it 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]). Prior notice is not required where a party creates the dangerous condition alleged. See Hepburn v. Croce, 744 N.Y.S.2d 458 (2d Dept. 2002).

Defendants have not established that they did not create the dangerous

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condition alleged. According to plaintiff and King, the step was not permanently affixed to the stage and could be moved at anytime. The step would sometimes be located in the center of the stage, off to the left, or even not attached to the stage at all. The house lights were also turned off during performances and afterwards. The dimmed lighting coupled with the lack of a permanent stairway is sufficient evidence from which a finder of fact could conclude there was a dangerous condition.

Although defendants are not insurers of plaintiff's safety while at the premises, a property owner or possessor may be liable if it has failed to properly maintain the premises for its anticipated use (Schmerz v. Salon, 26 A.D.2d 691 *aff'd* 19 N.Y.2d 846 [1966]). The stage was frequently used by musicians who performed on a non-regular basis and who may have been unaware that the step moved from one location to another. Plaintiff's even testified that in the 15 or so years that he performed at Terra Blues, the step was always located in the same place, on the side of the stage; he had no reason to believe that the step would be moved during the approximately two minutes he went on stage to say goodnight to his friend. Given the transient nature of the performers, the type of lighting, and the non-permanent location of the step, there are triable issues of fact whether defendants used reasonable care in maintaining the stage and whether defendants created a dangerous condition by not having a permanent step in the first place. In this regard, defendants' arguments about whether it knew about the step being moved, is not dispositive on the issue of notice. Defendants have therefore not made a *prima facie* showing for summary judgment, as there are issues of fact whether defendants created a dangerous condition.

There are also triable issues of material fact about how plaintiff's accident

actually happened. Plaintiff alleges he fell off the stage while attempting to step down in the same location where he had accessed the stage all night and on prior occasions when he performed at Terra Blues. However, King testified that plaintiff fell off the middle of the stage while reaching over to shake somebody's hand. Given the inconsistent accounts of the accident, there are triable issues of fact concerning the cause and manner in which plaintiff's accident occurred.

As the moving party, defendants have a greater burden to produce evidentiary facts than its adversary (Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 [1979]). By their very nature, negligence cases do not lend themselves to summary judgment because the issue of whether the defendant (or plaintiff) acted reasonably under the circumstances is rarely an issue that can be decided as a matter of law (Ugarriza v. Schmieder, 46 N.Y.2d 471 [1979]). Here, not only have defendants failed to meet their burden of proof, but there are triable issues of fact requiring the denial of defendants' motion (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]; Rotuba Extrudes v. Ceppos, 46 N.Y.2d 223 [1978]). The determination of whether defendants were negligent is for the trier of fact to decide (Ugarriza v. Schmieder, supra).

Defendants have not proved that, as a matter of law, the dangerous condition alleged by plaintiff was not created by them. Therefore, defendants have not proved they are entitled to summary judgment. Even were the court to find that defendants did put forth evidence sufficient to shift the burden to plaintiff on this motion, plaintiff has raised material issues of fact that have to be decided at trial.

Conclusion

Defendants' motion for summary judgment is denied as it has not tendered sufficient evidence to eliminate any material issues of fact from the case. Since the note of issue has not been filed, this case shall continue with discovery.

A status conference will be scheduled for June 3, 2010 at 9:30 a.m., 60 Centre Street, room 232.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
May 3, 2010

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So Ordered, **NEW YORK**
COUNTY CLERK'S OFFICE



HON. JUDITH J. GISCHE, J.S.C.