

Kessler v Chelsea Papaya, Inc.
2010 NY Slip Op 31563(U)
June 21, 2010
Supreme Court, New York County
Docket Number: 104833/2007
Judge: Martin Shulman
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: SHULMAN
Justice

PART 1

Index Number : 104833/2007
KESSLER, MARCY
VS.
CHELSEA PAPAYA INC
SEQUENCE NUMBER : 003
SUMMARY JUDGEMENT

INDEX NO. 104833/07
MOTION DATE _____
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

TI

motion to/for _____

Notice of Motion _____ Exhibits A-M
Answering Affidavits — Exhibits 1-11 (plaintiff's); A-J (order)
Replying Affidavits _____

PAPERS NUMBERED	
1, 2	
3, 4, 5	
6, 7	

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED
JUN 22 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: June 21, 2010

MARTIN SHULMAN
J.S.C. J.S.C.

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: IAS PART 1

-----X
MARCY E. KESSLER,

Plaintiff,

Index No. 104833/07

-against-

CHELSEA PAPAYA, INC. and 23rd WEST
ASSOCIATES, INC.

Defendants.
-----X

MARTIN SHULMAN, J. :

Co-defendant, Chelsea Papaya, Inc. ("Chelsea" or "Tenant"), moves for summary judgment dismissing the underlying complaint and all cross-claims in this personal injury action arising from a trip/fall accident which occurred on June 28, 2005 at about 12:00 noon as plaintiff, Marcy E. Kessler ("Kessler" or "plaintiff") was exiting Tenant's restaurant located at 171 West 23rd Street, New York, New York (the "building"). Co-defendant 23rd West Associates, Inc. ("23 West" or "Owner") owns the building where the accident occurred. Both 23 West and Kessler oppose Chelsea's summary judgment motion.

Brief Accident Description

As gleaned from Kessler's deposition testimony (Exhibit H to Motion), plaintiff, a prior patron of Chelsea's restaurant located on the ground floor of the building, had just purchased a quick lunch to go at about noontime on June 28th. As she was passing through the opened entranceway to step onto the sidewalk, the back of her left foot sandal struck the sloping single-step riser, causing her to lose her balance and fall. In Kessler's own words:

[M]y foot landed on the riser of the step that goes outward as I was stepping out, and what caused it was my foot turned under, turned inward and I fell down onto the pavement. And as I was falling, I landed on the outer left side of my foot directly onto the cement, and as that happened, I fractured it and I just went right down into a seated position.

(Kessler EBT as Exhibit H to Motion at p. 20, lines 20-25, to p. 21, lines 2-5). As plaintiff was laying on the ground, she immediately experienced severe pain and dizziness. A fruit vendor offered plaintiff a chair and while being seated for a few minutes, Kessler felt faint and fell face forward onto the sidewalk, suffering additional injuries to her face, mouth and teeth (*Id.*, at p. 34).

Summary Judgment Motion

In seeking summary judgment dismissing plaintiff's verified complaint (Exhibit B to Motion) as against Chelsea as well as the related cross-claims 23 West has asserted against Chelsea, the latter makes the following points:

- ◆ According to 23 West's property manager (*see* Rivera EBT as Exhibit J to Motion at pp. 21-22), 23 West purchased the building in 1980, subsequently completing a gut renovation to convert it from a class B rooming house to a Class A multiple dwelling with ground floor space for stores;
- ◆ The step and riser as it is currently configured (Exhibit M to Motion) has remained essentially unchanged since the building's purchase. Inspections at the building by the N.Y.C. Department of Building have never resulted in a violation citation for the sloping riser prior to issuing the 1980 certificate of occupancy for the building (*see* Exhibit A to 23 West Opposition to Motion) or at any time thereafter;
- ◆ Chelsea concedes it periodically painted the riser yellow to conform to the restaurant decor (*see* Bhuyian EBT as Exhibit I to Motion at p. 21) and placed warning decals on the exterior, upper window portion of every restaurant door exit for invitees to "Watch Your STEP!" (Exhibit M to Motion). Nonetheless, Chelsea never made any physical changes to the implicated step and riser from the inception of its tenancy, to date, and neither the Owner nor Tenant has ever received any complaint and/or

report of any accident involving the sloping riser prior to Kessler's accident;

- ◆ As required in Chelsea's lease with 23 West, only the Owner is required to "maintain and repair the public portions of the building, both exterior and interior . . ." whereas, Tenant is required to "take good care of the demised premises and the fixtures and appurtenances therein and the sidewalks¹ adjacent thereto and at its sole cost and expense make all non-structural repairs thereto . . ." (see Exhibit L to Motion at ¶ 4); and
- ◆ After conducting an on-site inspection of the sloping riser which included taking measurements² and photographs, Chelsea's engineering expert, John A. D'Onofrio, P.E., opined that the sloping riser is structural by design, does not run afoul of the N.Y.C. Building Code or any other relevant regulation and is visibly open and obvious to any pedestrian-customer caring to look before ascending or descending that single step from which Kessler fell, all factors which therefore absolve Chelsea of any duty to Plaintiff because the sloping riser is not inherently dangerous (Exhibit K to Motion).

Opposition to Motion

Relying in part on the deposition testimony of its property manager and viewing the D'Onofrio Affidavit and Report in support of Chelsea's summary judgment motion to be procedurally defective, 23 West essentially argues that the step and sloping riser are non-structural and part of the sidewalk for which Chelsea is contractually responsible to maintain and repair; by placing warning decals on its restaurant exit doors and routinely re-painting the sloping riser yellow to highlight its inherently

¹ The rider annexed to Chelsea's lease further provided that "Tenant shall be responsible for repairs to the sidewalk, removing any garbage, snow, etc., for the width of said store premises as well as sweeping 18" beyond the curb." (Id. at ¶ 9 to Lease Rider).

² As measured, "the subject exit is 41 inches wide. The vertical difference between the finished floor and the adjacent public sidewalk is approximately 9 inches. The riser for the single step is angled 23 degrees from the vertical with the bottom extending approximately 4-inches farther from the building than the top. At the time of this incident, the riser was painted yellow." (see Engineer's Report as Exhibit K to Motion at p. 17, ¶ 2 [otherwise incorporated by reference in the D'Onofrio Aff. in support of Motion]).

dangerous condition, Chelsea assumed a duty to ensure the safety of all patrons who enter and exit its restaurant – including Kessler; the sloping riser existed prior to 23 West's 1980 purchase of the building; prior to and subsequent to the issuance of the certificate of occupancy, 23 West has never been cited for a violation of any statute, ordinance or other relevant New York City Building Code regulation with respect thereto; and the Owner has contractual indemnification rights foreclosing Chelsea's dismissal from this action.

In opposing Chelsea's summary judgment motion, plaintiff apparently has chosen not to weigh in substantively on Chelsea's and 23 West's respective finger pointing positions. Rather, it contends that both co-defendants generally have a duty to maintain the building in a safe condition and should be jointly and severally liable for her accident.

However, plaintiff strenuously takes issue with the notion that the sloping riser was an open and obvious condition (arguably barring this lawsuit as a matter of law). Contrarily, Kessler highlights Chelsea's admitted actions to post "Watch Your STEP!" decals on all its restaurant exit doors and repeatedly paint the non-vertical riser yellow (under consideration is the possibility of Chelsea painting the riser a brighter red color) which "inarguably constitutes . . . [Chelsea's] recognition of a hazard, i.e., the dangerous step." (Kutner Opp. Aff. at ¶ 19).

Joining in this chorus is plaintiff's own engineering expert who implicitly attests with a reasonable degree of engineering certainty *inter alia* to the following:

[T]he riser is not 90°- vertical, [as] required by common sense and general engineering principles . . . Risers have to be vertical for safety reasons, and this riser is clearly unsafe, a tripping hazard . . . The

defendants' own actions in painting the riser with a luminescent color, as a warning, is a tacit acknowledgment . . . that the defendants are aware of the danger posed. However, the "warning color" paint is useless for a customer exiting the store, since such a person cannot see the paint. And, it is most significant that the non- 90° riser poses the danger to the *exiting individual* [emphasis in the original], because he/she is exposed to the tripping hazard when his-her descending foot's heel catches the sloping riser, pivoting the toes downward and pitching the customer face-first, forward into the pavement just as occurred to Ms. Kessler. . . Therefore, the non-vertical riser is in fact thus defective, and violates universally-accepted engineering principles for the construction of steps. In engineering, not all principles are contained in codes, and the requirement that a riser be vertical is so fundamental that it need not be so specified.

Droessler Opp. Aff. at ¶¶ 5, 8-11 and 14).

DISCUSSION

"[T]he proponent of a summary judgment motion 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 [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to a motion's opponent to "present facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If a motion's opponent does not competently controvert any evidentiary supportive fact, that fact may be deemed admitted. *Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 544 (1975); see also, *Monroe Dewey Partners v MDR Development, Inc.*, 159 AD2d 948 (4th Dept 1990). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Preliminarily, plaintiff's expert, Charles R. Droessler, P.E., has nothing to say to counter Chelsea's engineering expert's inspectorial finding that the sloping single-step riser is structural with a load-bearing element. Thus, this court can conclude that plaintiff's engineering expert implicitly agrees with D'Onofrio's finding resulting in it being a deemed admitted fact.

Relevant to the issue of whose legal duty it is to maintain the building exterior (including the sloping single-step riser), the Owner has not presented an expert's affidavit containing a fact-based opinion sufficient to controvert or in any way raise a material issue of fact as to Engineer D'Onofrio's opinion that the sloping single-step riser is structural in nature and a load bearing element of the building.³ For that matter, 23 West has not even proffered any competent evidence to refute Chelsea's engineering expert's finding contained in his sworn opinion (not procedurally deficient in any respect) formed *inter alia* after his review of all relevant statutes and regulations and his field inspection of the building, Tenant's restaurant and the sloping riser in issue.

Thus, without any factual foundation, 23 West's attorney and its property manager incompetently offer speculative conclusions about the purported non-structural nature of the sloping step and riser. Nor has 23 West competently shown how this single-step at the entrance of Chelsea's restaurant and a structural part of the

³ As can be discerned on this record the parties respectively developed, in the absence of any N.Y.C. Building Code provision or other relevant regulatory definition, neither plaintiff nor 23 West has shown that D'Onofrio's reliance on an industry definition of "structural" as it applies to the step and riser is misplaced (*see* Exhibit K to Motion at p. 13, n.11)("Structural. Said of a load bearing member, element, etc. of a building.").

public portion of the building on its property line constitutes a part of the abutting sidewalk where Kessler fell. That being said, the unambiguous provisions of the co-defendants' lease (Exhibit L to Motion at ¶¶ 3 and 6) place the contractual responsibility for maintaining the single-step riser squarely on 23 West's shoulders. Stated differently, as the Owner and lessor, 23 West has a contractual obligation to maintain and repair the exterior public portion of the building (*cf. Euvino v Loconti*, 67 AD3d 629, 631 [2nd Dept 2009]) including the sloping riser which Kessler alleged caused her to fall. And without any lease obligation to the Owner and/or a concomitant legal duty⁴ to any invitee to its restaurant (regardless of the visitor's purpose) to maintain and repair the sloping riser for an invitee's safety, Chelsea's motion for summary judgment dismissing this action as well as 23 West's cross-claims as against Tenant must be granted.

To round out this discussion, the developed record does make it a close question whether the physical dimensions and characteristics of the painted yellow sloping riser made its condition open and obvious or inherently dangerous. And the dueling opinion affidavits of plaintiff's and Tenant's respective engineering experts about the sloping riser did sufficiently raise a material issue of fact on this question, which is central to the liability issue. In this context, it is important to note that "while an open and obvious danger negates the duty to warn and is relevant to the issue of comparative negligence, it does not negate the duty to maintain the premises in a reasonably safe condition . . ." (*see Francis v 107-145 West 135th Street Associates, LP*,

⁴ Under these circumstances, Kessler has not demonstrated that Tenant's gratuitous gestures to place warning decals on the exterior portion of its restaurant's exit doors and periodically refresh the yellow paint on the sloping riser legally imposed an assumption of a duty to invitees such as plaintiff here.

70 AD3d 599, 600 [1st Dept 2010]).

Thus, while 23 West devoted its voluminous papers to conclusorily suggest the sloping riser was non-structural in nature– Chelsea would otherwise have been contractually obligated to maintain and repair– Owner took no position regarding the sloping riser's condition which as a material question of fact, this record makes clear can only be resolved via an outcome-determinative jury verdict.

Accordingly, it is

ORDERED that Chelsea's motion for summary judgment is granted dismissing this action and all cross-claims against Tenant. The Clerk is directed to enter judgment accordingly.

This constitutes this court's Decision and Order. Courtesy copies of same have been provided to counsel for the parties.

DATED: New York, New York
June 21, 2010


HON. MARTIN SHULMAN, J.S.C.

FILED
JUN 22 2010
NEW YORK
COUNTY CLERK'S OFFICE