SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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RHONDA ZELLER,

Plaintiff,

-against-

CHRISTOPHER STASI, J. CHRISTOPHER'S STEAKHOUSE LOUNGE, LLC and JOSEPH MASIELLO,

Defendants.

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MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 12
Index No.: 020323/08
Motion Seq. No.: 02

DECISION AND ORDER

Papers Read on this Motion:

Defendants' Notice of Motion	02
Plaintiff's Affirmation in Opposition	xx
Defendants' Reply Affirmation	xx

The Defendants move for an order, pursuant to CPLR §3212, for summary judgment. The Plaintiff opposes the motion.

Plaintiff commenced this action for personal injuries allegedly sustained on April 9, 2008 at approximately 11:00 P.M. in a trip and fall on a flight of stairs at the rear of defendants' J. Christopher's Steakhouse Lounge ("Steakhouse") located at 103 Post Avenue, Westbury, New York.

Defendants note plaintiff's deposition testimony (see Exhibit defendant annexed to defendants' motion; the following pages refer to that exhibit). Plaintiff only had one drink all night, and she denied being intoxicated (pgs. 28, 40); plaintiff's shoes had 2-2 ½ inch high heels (p. 29); the back steps were irregular, i.e., the second step felt "deeper" than the first and plaintiff fell (p. 45); plaintiff did not report the incident to

anyone in the restaurant (p. 50); and plaintiff denied that she was ever in the Steakhouse's kitchen (p. 56). Plaintiff had been to the restaurant once before about six (6) months before the April 9, 2008 incident (see Exhibit 7, p. 20 annexed to plaintiff's affirmation in opposition).

Defendants offer the deposition of Jason Dellaratta, the general manager of the Steakhouse (see Exhibit E annexed to defendants' motion; the following pages refer to that exhibit). Dellaratta stated the door from the bar to the outside did not have steps since it was level (p. 35); the door from the Steakhouse kitchen to the outside had steps (pgs. 19, 28); customers never used the kitchen exit, it was not permitted (pg. 19); there were no signs that indicated the kitchen doors were for employees only (p. 19).

Defendants also offer the deposition of Defendant and owner of the Steakhouse, Christopher Stasi (see Exhibit F annexed to defendants' motion; the following pages refer to that exhibit). Stasi stated that the kitchen door leading outside had two steps but no customers were permitted in the kitchen area and Stasi never observed customers walking through the kitchen area (pgs. 17, 21);customers were not allowed to use the rear kitchen door to exit the restaurant (p. 21); Stasi was not aware of any other incidents involving the kitchen exit steps (p. 22). Stasi stated there was no signage on the outside of the kitchen door (that separated the kitchen from the dining room) that indicated "employees only" (pgs. 17-18); the kitchen was in the general direction

toward the rear of the restaurant (p. 17).

Defendants thus contend that the exit with the stairs was through the kitchen and with an alleged ban of non-employees in the kitchen and plaintiff's testimony that she, the plaintiff, did not go in the kitchen, defendants argue plaintiff's position is not viable in that it was impossible for the exit with the stairs (the kitchen exit) to have caused plaintiff's accident.

In reply, Plaintiff states she clearly identified the exit with stairs from the Steakhouse was involved in her April 9, 2008 incident.

In her affidavit dated June 22, 2010 (see Exhibit 6 annexed to Plaintiff's affirmation in opposition), post Steakhouse's May 2010 motion, Plaintiff states she was not aware that she, the Plaintiff, was in the kitchen as she attempted to exit the restaurant since she had gone through an unmarked doorway (see Exhibit 6, ¶ 2).

The credibility of witnesses, the reconciliation of conflicting statements, a determination of which should be accepted and which rejected, the truthfulness and accuracy of the testimony, whether contradictory or not, are issues for the trier of the facts (*Lelekakis v Kamamis*, 41 AD3d 662 [2d Dept 2007]; *Pedone v B & B Equipment Co., Inc.*, 239 AD2d 397 [2d Dept 1997]).

Thus, it is for the trier of the fact to evaluate the "employees only" prohibition into the kitchen and plaintiff's claim that she was unaware that she exited through the

area designated as the "kitchen area."

A landowner must act as a reasonable person in maintaining his or her property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury and the burden of avoiding the risk (*Peralta v Henriquez*, 100 NY2d 139 [2003]; *Tagle v Jakob*, 97 NY2d 165 [2001]; *Basso v Miller*, 40 NY2d 233 [1976]).

A landowner has a duty to maintain its premises in a reasonably safe condition and to warn of a dangerous condition that it not readily observable with the reasonable use of one's senses (*DiVietro v Gould Palisades Corp.*, 4 AD3d 324 [2d Dept 2004]). A reasonably safe condition takes in all circumstances including the purpose of the person's presence on the property and the likelihood of injury (*Macey v Truman*, 70 NY2d 918 [1987]).

While the extent of a landlord's duty to maintain property varies, generally it is one of reasonable inspection (*see Hayes v Riverbend Housing Co., Inc.*, 40 AD3d 500 [1st Dept 2007]; *see also Zuckerman v State*, 209 AD2d 510 [2d Dept 1994]).

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 respect to the inspection and maintenance of the stairs of the Steakhouse.

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]).

Of course, a defendant must have either actual or constructive notice of the hazardous condition that caused the plaintiff to slip and/or fall (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967 [1994]; *Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]).

In a premises liability action, the plaintiff may satisfy the burden of showing that the property owner was on notice of the dangerous condition that allegedly resulted in the plaintiff's injury by producing evidence that an ongoing dangerous condition existed in the area of the incident, which condition was left unaddressed by the property owner (*Talavera v New York City Transit Authority*, 41 AD3d 135 [1st Dept 2007]).

When the plaintiff proceeds on the theory of constructive notice, the plaintiff must ultimately prove at trial that the defect which caused the accident was visible and apparent, and that it existed for a sufficient length of time prior to the accident to permit

the defendant (or its employees) to discover and remedy it (*Gordon v American Museum of Natural History*, *supra; Daniely v County of Westchester*, 297 AD2d 654 [2d Dept 2002], *lv to app den* 100 NY2d 501 [2003]).

The fact that the condition brought about the plaintiff's fall could be of an open and obvious nature and 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, supra; Moloney v Wal-Mart Stores, Inc.*, 2 AD3d 508 [2d Dept 2008]; *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]).

The fact that the plaintiff may have been comparatively negligent does not negate the liability of the landlord who has a duty to keep the premises safe (*Powers v St. Bernadette's Roman Catholic Church*, 309 AD2d 1219 [4th Dept 2003]).

A plaintiff must demonstrate that a defendant's negligence was a substantial cause of the incident (*Howard v Poseiden Pools, Inc.*, 72 NY2d 972 [1988]).

Plaintiff offers the affidavit of her professional engineer expert, Thomas R. Parisi (see Exhibit 22 annexed to plaintiff's affirmation in opposition). Parisi inspected the site on August 5, 2008 (four months after the incident) and found, among other things, there were no handrails or guardrails by the stairs, the stair treads and risers were uneven and

varied in height, the riser heights were excessive and the staircase geometry was not in conformance to building code requirements. Parisi opined the stairs, based on a reasonable degree of engineering certainty, were not in good and acceptable condition at the time of the incident.

An issue as to whether stairs complied with the state building code's maximum riser height can be an issue that precludes summary judgment (*see Feldman v Dombrowsky*, 288 AD2d 605 [3d Dept 2001]).

Plaintiff's evidence raised an issue of fact as to whether the lack of a handrail in the stairwell was a structural defect that violated a specific statutory provision, contributing to her fall. (*see Pimental v Marx Realty & Improvement Co., Inc.,* 55 AD3d 480 [1st Dept 2008]).

A stairway can be deemed defective and hazardous where it is dimly lit and the stairway handrail is too close to the wall (*see Guzman v Haven Plaza Housing Development Fund Co., Inc., supra*).

Here, the plaintiff's expert affidavit clearly alleges that the "defect" claim is not based on pure speculation (*see Chery v Exotic Realty Inc.,* 34 AD3d 412 [2d Dept 2006]). Plaintiff has raised the issue of fact as to whether or not the stairway in issue had a structural and/or design defect.

For a defendant owner to prevail on a summary judgment motion regarding 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 or constructive notice thereof (*Mokszki v Pratt*, 13 AD3d 709 [3d Dept 2004]).

Steakhouse has not met its burden.

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

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 Steakhouse's summary judgment motion to raise issues of fact that Steakhouse created the alleged dangerous condition. Here, the plaintiff has met her burden.

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v Journal News*, 211 AD2d 626 [2d Dept 1995]). Thus, the burden on the

moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062).

Here, Steakhouse has failed to meet its burden and its motion is **denied**. It is hereby

ORDERED, that all parties are directed to appear for trial on September 14, 2010 in DCM at 9:30 a.m.

This constitutes the Decision and Order of the Court.

DATED: September 8, 2010
Mineola, N.Y. 11501

ENTER:

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

H:\DECISION - SUMMARY JUDGMENT\Zeller v Stasi GLM.wpd