

Kleiman v Craftsteak NYC, LLC
2010 NY Slip Op 32582(U)
September 16, 2010
Sup Ct, NY County
Docket Number: 102390/08
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

DECENT. HON Joan A. Mader

PART 11

Index Number : 102390/2008

KLEIMAN, GARY

vs
CRAFTSTEAK

Sequence Number : 002

DISMISS

INDEX NO. _____

MOTION DATE 7-8-10

MOTION SEQ. NO. _____

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 is decided in accordance
with the annexed Memorandum Decision + order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
SEP. 21 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: September 16, 2010

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
GARY KLEIMAN and CHRIS McAILEY,

Index No.: 102390/08

Plaintiffs,

-against-

CRAFTSTEAK NYC, LLC and 85 TENTH AVENUE
ASSOCIATES, LLC,

Defendants.

-----X
JOAN A. MADDEN, J.

FILED
SEP 21 2010
NEW YORK
COUNTY CLERK'S OFFICE

In this personal injury action, defendant Craftsteak NYC, LLC ("Craftsteak") moves for summary judgment dismissing the complaint against it, and plaintiff opposes the motion. For the reasons set forth below, the motion is denied.

BACKGROUND

Plaintiff Gary Kleiman ("Kleiman") seeks damages for personal injuries he allegedly sustained on June 3, 2007, when he fell down the stairs at a restaurant located at 85 West 10th Avenue, New York, New York which is owned by Craftsteak ("the restaurant").¹ Defendant 85 Tenth Avenue Associates, LLC ("85 Tenth Ave.") leased the restaurant to Craftsteak.²

At his deposition, Kleiman testified that the incident occurred as he and a group of colleagues were preparing to leave the restaurant. He testified that just prior to his fall he recalled standing on the top landing several feet away from the stairwell, then fell from the top of the stairwell. Although he had no recollection of how the fall occurred, his colleague, Robert Pearlman ("Pearlman"), advised him that he saw him tumbling down the stairs as a result of the dark conditions. Before he fell, Kleiman observed that the stairwell was very dark and dimly lit. He also heard his fellow patrons discussing that the stairwell was direct and dangerous.

¹ Kleiman's wife, Chris McAiley, seeks to recover for loss of her husband's services, society and consortium.

²By stipulation dated February 9, 2010, the action was discontinued as against 85 Tenth Ave.

Kleiman's colleagues Allan Pashcow and Sandra Cahn testified at their depositions that the stairwell was dark. Richard Breitreutz, Craftsteak's general manager at the time of the incident, testified that the stairwell was well lit by three pendant halogen lights, as well as lights on the sides of the stairwell, and ambient street lighting streaming in through an open window. However, he also testified that he left the restaurant an hour or two before the incident. Breitreutz further testified the lighting was preset by the restaurant's architect, Peter Bental, and at dinner time it was set at the darkest setting.

Craftsteak now moves for summary judgment, arguing that there is no evidence to establish that plaintiff's fall was caused by inadequate lighting. In support of its position, Craftsteak points to Kleiman's testimony that he could not recall the cause of his fall. Craftsteak further argues that there is no evidence that Craftsteak created a dangerous condition, based on Breitreutz's deposition stating that the stairwell was well lit. Craftsteak also argues that even if there were evidence that the lighting was inadequate, Craftsteak had no actual or constructive notice of the condition, and notes that neither Kleiman or his colleagues testified that they or anyone else notified Craftsteak of the alleged dark condition of the stairwell on the date of the accident.

Kleiman opposes the motion, arguing that there are triable issues of fact as to whether the inadequately lit staircase caused him to fall, and as to whether Craftsteak caused or created the condition or had notice of it. In support of his position, Kleiman relies on his own deposition testimony and the testimony of Cahn and Pashcow, that the staircase and landing were inadequately lit.

Kleiman also submits an affidavit from his colleague, Pearlman, who witnessed his fall. He states that "the staircase [where Kleiman fell] was extremely dark and very poorly

lit" and that the staircase landing was also "poorly lit." In addition, he states that the dark color of the staircase and landing made the staircase "more hazardous" and that there were no markings indicating where the landing ended and the first step began. Pearlman also describes the accident as follows:

I saw [Kleiman] walking along the top landing of the staircase, parallel to the landing and looking straight ahead, when he suddenly fell from the edge of the landing and down that staircase. I was also standing at the top of the staircase and had been talking to [Kleiman] just prior to his fall. [He] was not facing downward to the staircase, did not appear to be walking downward or preparing to do so and was not walking backward as well. The dark and dangerous conditions I mentioned along the stairs, it was obvious to me, caused him to not be able to observe where the landing ended and the staircase began....

Kleiman also submits an expert affidavit from William Marletta, a Board Certified Safety Professional, who reviewed the pleadings and evidence in the action and performed two inspections of the restaurant. Mr. Marletta opines that the lack of demarcation between the landing and the first step, as well as the lack of lighting on the first step, violated New York City building codes and that these violations proximately caused Kleiman's injuries by creating a misleading and dangerous visual cue. To support his affidavit, Marletta attaches photographs of the stairwell taken both during the day and nighttime to highlight the conditions he described.

DISCUSSION

On a motion for summary judgment, the proponent "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." Wingard v. New York Univ. Med. Center, 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party

opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

“The owner or possessor of a property has a duty to maintain the property in a reasonably safe condition and may be held liable for injuries arising from a dangerous condition on the property if such owner or possessor either created the condition, or has actual or constructive notice of it and a reasonable time within which to remedy it.” Freidah v. Hamlet Golf and Country Club, 272 AD2d 572, 573 (2nd Dept 2000). Here, even assuming that evidence submitted by Craftsteak that the stairwell was adequately lit met its prima facie burden, plaintiffs have controverted this showing based on the deposition testimony of Kleiman and his colleagues Cahn, Pashcow, and Perlman, and the expert affidavit, which raise a triable issue of fact as to whether the stairway and area around it were adequately lit.

“To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it.” Gordan v. American Museum of Natural History, 501 NYS2d 646, 647 (1986). Although it appears that no complaints were made regarding the lighting on the night of the incident, evidence that the stairwell and landing were dim and poorly lit, including the photographs submitted by plaintiffs' expert, are sufficient to raise factual questions as to whether the condition was visible and apparent such as to give Craftsteak notice.

In addition, there are triable issue of fact as to whether Craftsteak created the dangerous condition by inadequately lighting the staircase and landing, and by failing to demark the area between the landing and the first step. Freidah v. Hamlet Golf and Country Club, 272 AD2d at 573 (complaint should not have been dismissed where there were triable issues of fact as to whether inadequate lighting created dangerous condition).

Moreover, the record is sufficient to raise factual questions as to whether the alleged lack of adequate lighting and demarcation between the landing and the first step were a substantial factor in causing Kleiman to fall. While Kleiman cannot recall the details of his fall, the record, including the statements in Pearlman's affidavit describing Kleiman's fall, are sufficient to create a reasonable inference as to causation. See Chimilio-Ramos v. Banguera, 62 AD3d 538, 538 (1st Dept 2009) (order granting summary judgment reversed notwithstanding that plaintiff "was unable to identify the cause of her accident" when she fell down an open sidewalk vault because the evidence was sufficient to permit drawing a reasonable inference as to causation); Quinlan v. Cecchini, 41 NY2d 686 (1977) (whether unlit landing to stairway was proximate cause to plaintiff's injuries was a triable issue of fact); Freidah v. Hamlet Golf and Country Club, 272 AD2d at 573 (whether adequate lighting helped create dangerous condition a triable issue of fact).

Accordingly, Craftsteak's motion for summary judgment must be denied.

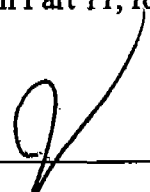
CONCLUSION

In view of the above it is

ORDERED that Craftsteak's motion for summary judgment is denied; and it is further

ORDERED that a pre-trial conference shall be held in Part 11, room 351 at on November 4, 2010 at 2:30 pm.

DATED: September 16, 2010



 J.S.C.
FILED
 SEP 21 2010
 NEW YORK
 COUNTY CLERK'S OFFICE