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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 17 NASSAU COUNTY

PRESENT:
Honorable Karen V. Murphy
Justice of the Supreme Court

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MADELINE RASOR,

Plaintiff(s),

-against-

BACKSTAGE SPORTS BAR & GRILL and C.B.H. PROPERTIES, INC.,

Defendant(s).

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Index No. 20081/08

Motion Submitted: 7/28/10
Motion Sequence: 002

MARILYN SHERIDAN,

Plaintiff(s),

-against-

BACKSTAGE SPORTS BAR & GRILL and C.B.H. PROPERTIES, INC.,

Defendant(s).

---x

Index No. 20084/08

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X

Defendants Woodmere Successors, Inc., d/b/a Woodmere Lanes and Backstage Lounge, s/h/a Backstage Sports Bar & Grill, *et., al.,* move for an order for summary judgment pursuant to CPLR §3212 dismissing the complaint.

In February of 2008 the plaintiff Madeline Rasor and her identical twin sister, Marilyn Sheridan each age 73 at the time both fell within a span of some 30 minutes while attending a family birthday party held at a bowling alley/bar establishment then commonly known as the "Backstage" bar.

The plaintiff and her twin sister, who then resided together, arrived early with other family members in order to set up the party area, which was located on an elevated, 12 by 40 foot platform-type portion of the restaurant floor.

The elevated platform was divided from the immediately adjacent, lower level dance floor/bar area by a single, 10 to 12 inch-high riser or step.

According to the plaintiff, when she and her family members arrived to set up for the party, which was to begin about an hour later at 8:00 p.m., the restaurant was very poorly lighted. The plaintiff described the lighting as allegedly "pitch black" and "like midnight" and stated that there were no lights on at all over the elevated party area.

Approximately 30 minutes into the set-up process, the plaintiff's sister, Marilyn Sheridan, fell off the platform onto the lower dance floor area level while walking to a nearby bathroom area, allegedly sustaining personal injuries. Shortly after she fell, she was placed in a chair and relocated from the lower dance floor level to the elevated platform, where people attended to her.

The bartender on duty described the Sheridan incident as creating "[a] lot of commotion" and stated that people gathered and "swarmed around" Sheridan. After she fell, Sheridan and other family members complained about the adequacy of the lighting to the manager on duty, but their requests were allegedly ignored, a claim disputed by the defendant.

The plaintiff contends that although she was told that her sister fell, and was working on the same platform at the time and for a half-hour thereafter, she allegedly never spoke directly to her sister and did not know how her accident occurred.

Some 30 minutes after Sheridan's fall, the plaintiff was apparently taping "happy birthday" posters to several support columns which were situated on the elevated platform where the party tables and food trays were set up. She had already decorated four or five of the columns, although the columns she previously decorated were not situated in close proximity to the platform edge.

The plaintiff approached a column within close proximity to the step-down, and recalled possibly affixing a poster to it. After doing so, she intended to swing around and

attach a second poster to the other side of the column, which is when her accident occurred. More specifically, the plaintiff explained that "[w]hen I went around to go to this side [of the column] I put my foot back to go over there [and] there was no floor there. I did not realize I was at the end [of the platform] and I fell backwards" onto the dance floor below.

The plaintiff further stated that when the accident took place, she was attempting to position her body in front of the column and stepped to her right in order to do so. She planted her right foot on the elevated platform, but when she brought her left foot around so as to place it next to her right, "there was nothing there and . . . [she] fell down" since she "didn't know . . . [she] was at the end of this [the platform]."

She was looking at the column, not the floor at the time, and was in the process of hanging the poster when she fell. The plaintiff later repeated that "I went to go here and then I stepped back" although upon further questioning, she later claimed that she "wasn't walking backwards," but rather, she took a step "[t]o the side."

Amy Zuckerman was employed as bartender on the night the plaintiff's accident occurred and witnessed the fall from her vantage point at the bar area. Zuckerman who left the defendant's employ well prior to the accident observed the plaintiff attempting to place a poster on a column and then saw her "walking backwards," without paying attention, after which she fell off the platform.

She had "no difficulty" observing the plaintiff at the time, since the area was well lighted. In fact, the lighting intensity had allegedly been increased after the plaintiff's sister had her prior accident. Zuckerman later filled out an accident report with respect to the plaintiff Madeline Rasor's accident (the second accident), which stated, in part, "[w]oman was not paying attention, she took a few steps backwards and fell off the stage while hanging decorations on the pole."

By summons and complaint dated November 2008, the plaintiff Madeline Rasor commenced the within personal injury action averring, *inter alia*, that the defendant was negligent in creating a dangerous condition which proximately caused the alleged injuries she sustained.

The defendant has answered, denied the material allegations of the complaint and interposed various affirmative defenses. Notably, the plaintiff's sister has also commenced her own action against the defendant, which has since been consolidated with the plaintiff's action.

The defendant now moves for summary judgment dismissing the complaint. Among other things, the defendant contends that the "evidence establishes that the accident occurred

because the plaintiff admittedly did not realize that she was standing near the edge of the platform . . . ." The motion should be granted.

It is settled that owners and business proprietor must maintain their 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" (***Basso v. Miller***, 40 N.Y.2d 233, 241, 352 N.E.2d 868, 386 N.Y.S.2d 564 (1976) *see generally,* ***Peralta v. Henriquez***, 100 N.Y.2d 139, 143, 790 N.E.2d 1170, 760 N.Y.S.2d 741 (2003); ***Walsh v. Super Value, Inc.***, 904 N.Y.S.2d 121, 125 2010 N.Y. Slip Op. 05546 (2d Dept., 2010); ***Pampillonia v. Burducea***, 68 A.D.3d 1081, 892 N.Y.S.2d 451 [2d Dept., 2009]).

There is no duty, however, "to warn of conditions that are not inherently dangerous and that are readily observable by the reasonable use of one's senses (*see,* ***Weiss v. Half Hollow Hills Cent. School Dist.***, 70 A.D.3d 932, 893 N.Y.S.2d 877 (2d Dept., 2010); ***Groon v. Herricks Union Free School Dist.***, 42 A.D.3d 431, 432, 839 N.Y.S.2d 788 (2d Dept., 2007); ***Capozzi v. Huhne***, 14 A.D.3d 474, 475, 788 N.Y.S.2d 152 [2d Dept., 2005]).

Significantly, "[e]vidence of negligence is not enough by itself to establish liability" since "it must also be proved that the negligence was the cause of the event which produced the harm sustained . . . " (***Sheehan v. City of New York***, 40 N.Y.2d 496, 501, 354 N.E.2d 832, 387 N.Y.S.2d 92 (1976) *see generally,* ***Gerrity v. Muthana***, 7 N.Y.3d 834, 835-836, 857 N.E.2d 527, 824 N.Y.S.2d 206 (2006); ***Burgos v. Aqueduct Realty Corp.***, 92 N.Y.2d 544, 550, 706 N.E.2d 1163, 684 N.Y.S.2d 139 (1998); ***Derdiarian v. Felix Contracting Corp.***, 51 N.Y.2d 308, 314-315, 414 N.E.2d 666, 434 N.Y.S.2d 166 (1980); ***Curran v. Esposito***, 308 A.D.2d 428, 429, 764 N.Y.S.2d 209 [2d Dept., 2003]).

Although proximate cause may be established without direct evidence of causation, by inference from the circumstances of the accident (***Costantino v. Webel***, 57 A.D.3d 472, 869 N.Y.S.2d 179 (2d Dept., 2008) *see,* ***Burgos v. Aqueduct Realty Corp., supra***), "[m]ere speculation as to the cause of a fall . . . is fatal to a cause of action" (***Oettinger v. Amerada Hess Corp.***, 15 A.D.3d 638, 639, 790 N.Y.S.2d 693 (2d Dept., 2005) *see,* ***Melnikov v. 249 Brighton Corp.***, 72 A.D.3d 760, 761, 898 N.Y.S.2d 6 (2d Dept., 2010); ***Morgan v. Windham Realty, LLC***, 68 A.D.3d 828, 829, 890 N.Y.S.2d 621 (2d Dept., 2009); ***Manning v. 6638 18th Ave. Realty Corp.***, 28 A.D.3d 434, 435, 814 N.Y.S.2d 178 [2d Dept., 2006]; ***Curran v. Esposito, supra***).

Here, the defendant has established its *prima facie* entitlement to judgment as a matter of law by demonstrating that the plaintiff's accident was not attributable to its alleged failure to maintain its property in a reasonably safe condition (*e.g.,* ***Baffa v. New Plan of Hillside Village, LLC***, 72 A.D.3d 712, 898 N.Y.S.2d 478 (2d Dept., 2010); ***Bolde v. Borgata Hotel***

Casino & Spa, 70 A.D.3d 617, 892 N.Y.S.2d 892 (2d Dept., 2010); ***Louman v. Town of Greenburgh***, 60 A.D.3d 915, 916, [2d Dept., 2009]).

Specifically, the defendant has produced, *inter alia*, sworn deposition testimony which depicts the configuration of the accident location and the manner in which the plaintiff's accident took place.

In substance, the relevant evidence establishes that the plaintiff was present on the platform for approximately an hour prior to her accident and was plainly aware of the elevation differential which she necessarily encountered upon first accessing the catering platform (*cf.*, ***Kaufmann v. Lerner New York, Inc.***, 41 A.D.3d 660, 661, 838 N.Y.S.2d 181 (2d Dept., 2007); ***Lombardi v. Silk Mill Condominiums, Inc.***, 37 A.D.3d 429, 430, 829 N.Y.S.2d 228 [2d Dept., 2007]).

More fundamentally, "[a]lthough the plaintiff alleged that the lighting at the location of her fall was inadequate at the time of the incident," she never actually "testified at her deposition . . . that . . . she [fell] as a result of inadequate illumination" (***Bishop v. Marsh***, 59 A.D.3d 483, 873 N.Y.S.2d 201 (2d Dept., 2009), *i.e.*, she did not attribute her fall to inadequate lighting since she did not testify "that she was unable to see and that she misstepped as a result" (***Curran v. Esposito, supra***; ***Wright v. South Nassau Communities Hosp.***, 254 A.D.2d 277, 278, 678 N.Y.S.2d 636 (2d Dept., 1998) *see*, ***Louman v. Town of Greenburgh, supra; Raghu v. New York City Housing Authority***, 72 A.D.3d 480, 482, 897 N.Y.S.2d 436 (1st Dept., 2010); ***DiGeorgio v. Morotta***, 47 A.D.3d 752, 752-753, 850 N.Y.S.2d 556 [2d Dept., 2008]).

Rather, the plaintiff's testimony was to the effect that prior to falling, her gaze was fixed on the column as she attempted to tape a poster to it; that she stepped or shifted her position around the column while focusing on the sign; and that she then fell because she did not see the nearby step (***Groon v. Herricks Union Free School Dist., supra***; *see also*, ***Louman v. Town of Greenburgh, supra***).

The plaintiff did not testify that she scanned the surrounding floor before maneuvering around the column or at any particular time. Nor did she state that despite looking towards the location where she intended to step, she was still unable to properly discern the step-down or height differential because of, *inter alia*, an alleged lighting deficiency or some other claimed defect (***Louman v. Town of Greenburgh, supra***; ***Leib v. Silo Restaurant, Inc.***, 26 A.D.3d 359, 360, 809 N.Y.S.2d 185 [2d Dept., 2006]; ***Curran v. Esposito, supra***; ***Wright v. South Nassau Communities Hosp., supra***).

It bears noting that the non-party testimony of the defendant's former bartender, who personably witnessed the accident, is essentially the same in its descriptive detail; namely,

that the plaintiff was focused upon hanging a poster and fell while taking steps in some fashion near the column without first looking where she was going.

Accordingly, and even when viewed favorably to the plaintiff (*e.g,* ***Branham v. Loews Orpheum Cinemas, Inc.***, 8 N.Y.3d 931, 932, 866 N.E.2d 448, 834 N.Y.S.2d 503 [2007]), the available evidence demonstrates that the accident took place not because the lighting was inadequate or because the step-down was obscured or constructed in some dangerous fashion, but because the plaintiff moved either sideways or backwards without first looking where she was stepping, *i.e.*, "it was not the darkness that prevented her from seeing the . . . [step down] . . . but rather the fact that she 'wasn't looking'" (***Louman v. Town of Greenburgh, supra***, *see*, ***Bishop v. Marsh, supra***; ***DiGeorgio v. Morotta, supra***; ***Groon v. Herricks Union Free School Dist., supra***; ***Gordon v. New York City Transit Authority***, 267 A.D.2d 201, 202, 699 N.Y.S.2d 449 (2d Dept., 1999) *see also,* ***Reagan v. Saratoga Hotel Corp.***, 23 A.D.2d 642, 256 N.Y.S.2d 943 [1st Dept., 1965]).

Although a plaintiff is not required to "positively exclude every other possible cause" of an alleged accident (***Burgos v. Aqueduct Realty Corp., supra***; ***Gayle v. City of New York***, 92 N.Y.2d 936, 937, 703 N.E.2d 758, 680 N.Y.S.2d 900 (1998); ***Cintron v. New York City Transit Authority***, 61 A.D.3d 803, 804, 877 N.Y.S.2d 446 (2d Dept., 2009), there must still exist a sufficient nexus between the allegedly defective condition and the circumstances surrounding the plaintiff's fall to establish causation (***Louman v. Town of Greenburgh, supra***; *see,* ***Costantino v. Webel, supra***). Nor will the "mere happening of the accident" suffice to "establish liability on the part of the defendant" (***Lewis v. Metropolitan Transp. Auth.***, 99 A.D.2d 246, 251, 472 N.Y.S.2d 368 (1st Dept., 1984); ***Russell v. Meat Farms, Inc.***, 160 A.D.2d 987, 989, 554 N.Y.S.2d 709 [2d Dept., 1990]).

Here, a trier of fact would be required to base a finding of proximate cause upon speculative inferences which lack adequate support in the evidentiary record (*see, e.g.*, ***Melnikov v. 249 Brighton Corp., supra***; ***Baffa v. New Plan of Hillside Village, LLC, supra***; ***Costantino v. Webel, supra***; ***Curran v. Esposito, supra***).

In light of the Court's determination, it is unnecessary to reach the defendants' additional dismissal theories.

The Court has considered the plaintiff's remaining contentions and concludes that they are insufficient to defeat the defendants' motion for summary judgment.

Accordingly, it is,

ORDERED that the motion pursuant to CPLR §3212 by the defendants Woodmere Successors, Inc., d/b/a Woodmere Lanes and Backstage Lounge, s/h/a Backstage Sports Bar & Grill, *et., al.,* for summary judgment dismissing the complaint, is granted.

The foregoing constitutes the Order of this Court.

Dated: September 22, 2010
Mineola, N.Y.

Karen V. Murphy
J. S. C.
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ENTERED
OCT 01 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE