

Gonzalez v JEM Real Estate Co., LLC

2010 NY Slip Op 33377(U)

December 6, 2010

Supreme Court, New York County

Docket Number: 114677/08

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD

PART 35

Justice

Index Number : 114677/2008
GONZALEZ, BLANCA
vs.
JEM REAL ESTATE CO., LLC.
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 10/5/10
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED

DEC 09 2010

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

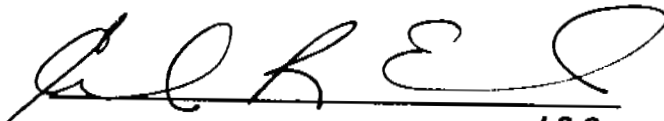
Upon the foregoing papers, it is ordered that this motion

Motion sequence 002 is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the motion by defendants Jem Real Estate Co., LLC, Caliente Cab Restaurant Co., Inc., and Caliente Waverly Rest. Corp., for summary judgment is denied. And it is further

ORDERED that counsel for defendant shall serve a copy of this order with notice of entry within twenty (20) days of entry on counsel for plaintiffs.

Dated: 12-6-10



HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
BLANCA GONZALEZ and CARLOS GONZALEZ,

Plaintiffs,

Index No.:
114677/08

- against -

JEM REAL ESTATE CO., LLC, CALIENTE CAB
RESTAURANT, CO., INC., and CALIENTE
WAVERLY REST. CORP.,

Defendants.

-----X
Carol Edmead, J.:

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In this action for personal injury, defendants Caliente Cab Restaurant Co., Inc. (Caliente Cab Restaurant), Caliente Waverly Rest. Corp. (Waverly) and JEM Real Estate Co. (JEM), move, pursuant to CPLR 3212, for an order granting summary judgment dismissal of the complaint on the ground that the condition was open and obvious and not inherently dangerous.

For the reasons set forth below, the motion is denied.

Background

On the evening of June 22, 2007, plaintiff was dining at the Caliente Cab Restaurant with her husband. After having a couple of drinks and appetizers, plaintiff descended the stairway leading to the restroom, which is located on the restaurant's basement level. While descending the stairs, plaintiff fell on the last step from the bottom, suffering a fracture of the right fibula, among other injuries. Plaintiff's husband alleges a claim for loss of consortium.

A review of the record reveals that the stairway to the restroom consisted of a series of approximately 12 stairs leading to a landing to the basement (the stairway), at which point a patron must turn right on the landing in order to come upon a hallway which leads to the restrooms. At the end of the landing, there is a single step down (the Step-down). At the base of the 12-step stairway, there is a sign which reads "Caution: One More Step", in red print. Photographs of the stairway and Step-down indicate that the individual steps of the stairway are covered with a black rubber material, whereas the Step-down consisted of tile, which blended in with tiles on the hallway floor leading to restroom. In addition, the photographs indicate that there was no handrail along the Step-down, i.e., from the landing to the restroom hallway. It is upon this Step-down where plaintiff fell, when she was looking for the restroom.

Plaintiff claims that the stairway and hallway leading to the restroom were dimly lit with ambient red light, there was no handrail along the staircase, the rise of the last step was too high and the last step was not clearly visible.

Defendant counters, among other things, that: (1) the reason plaintiff missed the step was because she was distracted in looking from the bathroom; and (2) the lighting was sufficient enough that plaintiff was able to see the bathroom doors before she fell.

Dominick Cappolla, Jr., the restaurant's director of operations, testified that while he did not recall any patrons falling off the Step-down at any time before the accident, he did recall one or two prior accidents involving the lower level.

Discussion

In order to grant summary judgment, the movant must proffer admissible evidence to make a prima facie showing of entitlement to judgment as a matter of law by producing sufficient evidence to show the absence of any material issue of fact (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Once the moving party has made this showing, the burden is on the opposing party to demonstrate "evidentiary 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]; *Zuckerman*, 49 NY2d at 562). "If there is any doubt as to the existence of a triable issue, the motion should be denied" (*Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

As a preliminary matter, the court denies defendants' motion to dismiss the action as against defendant Waverly, as defendants have not met their burden in demonstrating that Waverly had no interest or involvement in the restaurant where the accident occurred. But for its blanket assertions that Waverly is a

[* 5]

separate entity, defendants proffer no evidence to substantiate such claims. As such, the motion is denied on this point.

Defendants move for summary judgment dismissal of the complaint on the ground that the single Step-down was an open and obvious condition and not inherently dangerous. While a "landowner has a duty to maintain his or her premises in a reasonably safe manner," he or she "has no duty to protect or warn against conditions that are not inherently dangerous and that are readily observable by the reasonable use of one's senses," i.e. open and obvious conditions (*Groon v Herricks Union Free School Dist.*, 42 AD3d 431, 432 [2d Dept 2007]; see also *Broodie v Gibco Enters., Ltd.*, 67 AD3d 418 [1st Dept 2009]). The issue of whether a condition is open and obvious is fact-specific, and usually a question for a jury (see *Shah v Mercy Med. Ctr.*, 71 AD3d 1120 [2d Dept 2010]). However, it has recently been held that

"[w]hether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances. A condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted" (*id.*).

Further, "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" (*Francis v 107-145 W. 135th St. Assoc.*

Ltd. Partnership, 70 AD3d 599, 600 [1st Dept 2010]; see also *Caicedo v Cheven Keeley & Hatzis*, 59 AD3d 363 [1st Dept 2009]).

Defendants' motion is limited to plaintiff's alleged comparative negligence and does not address the issue concerning the lighting condition in the stairway, except to claim that it was lit well enough for plaintiff to make it down the first stairway without falling. This is not sufficient to show that the alleged dim lighting was not a proximate cause of her fall.

Defendant further asserts that plaintiff has not alleged a violation of any Building Code with respect to the stairs. However, even if there was no violation of a Building Code provision, plaintiff has asserted a common-law negligence claim, which may support a finding of negligence for "falls caused by stepdowns or changes in floor level" which "typically turns on factors such as, inadequate warning of the drop where there is, inter alia, poor lighting and inadequate demarcation between the raised and lowered areas" (*Capote v 55 W. 55th St. Assoc., LLC*, index No. 117529/04, *1-2 J. Diamond [Sup Ct, NY County Mar. 15, 2007], citing *Shreiber v Philip & Morris Rest. Corp.*, 25 AD2d 262, 263 [1st Dept 1966], *affd* 19 NY2d 786 [1967]).

Here, there was no demarcation between the levels of the Step-down to the restroom hallway nor any handrails (see *Zebzda v Hudson St., LLC*, 72 AD3d 679 [2d Dept 2010] [holding question of fact existed as to whether the absence of a handrail was a

departure from generally accepted customs and practices rendering the defendant negligent in failing to provide one)).

As there remain questions of fact concerning the lack of handrails, the lighting conditions and the demarcation of the Step-down where plaintiff fell, the motion by defendants is denied.

Conclusion

Accordingly, it is

ORDERED that the motion by defendants Jem Real Estate Co., LLC, Caliente Cab Restaurant Co., Inc., and Caliente Waverly Rest. Corp., for summary judgment is denied.

Dated: 12.6.10

ENTER:



J.S.C.

HON. CAROL EDMEAD

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