

**Howard v Alexandra Rest.**

2010 NY Slip Op 33521(U)

December 22, 2010

Supreme Court, New York County

Docket Number: 109987/07

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD  
Justice

PART 35

Howard, Ryan

INDEX NO. 109987/07

MOTION DATE 10/4/10

MOTION SEQ. NO. 004

MOTION CAL. NO. \_\_\_\_\_

- v -

Alexandra Restaurant

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for reargue

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

Motion sequence 004 is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the motion of George Repetti as Executor of the Estate of John Repetti, for leave to reargue his motion for summary judgment is denied; and it is further

ORDERED that the motion of Maxwell-Kates, Inc., for leave to renew its motion for summary judgment is denied.

**FILED**

DEC 29 2010

NEW YORK COUNTY CLERK'S OFFICE



**HON. CAROL EDMEAD** J.S.C.

Dated: 12/23/10

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: IAS PART 35

-----X  
HOWARD, RYAN J.,

Plaintiff,

-against-

Index No.  
109987/07

ALEXANDRA RESTAURANT, GEORGE REPETTI as  
Executor of the Estate of JOHN REPETTI, and MAXWELL-  
KATES, INC.,

Defendants.  
-----X

**FILED**

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NEW YORK  
COUNTY CLERK'S OFFICE

**EDMEAD, CAROL R., J.:**

This matter arises in connection with the slip and fall of plaintiff, Ryan J. Howard (Howard), at the premises having the address 455 Hudson Street, New York, NY 10014 (the Premises). At the time of the injury, December 3, 2006, the Premises was leased by defendant D.E.L. Inc. d/b/a Alexandra Restaurant (the Restaurant). John Repetti (whose Estate, together with George Repetti, will be referred to herein as the Owners) was the owner of the Premises at the time of accident, while defendant Maxwell-Kates (Manager) was the manager.<sup>1</sup>

By Decision and Order of this court, filed June 3, 2010 (Prior Decision), the motion of the Owners and the Manager for summary judgment dismissing the complaint was denied without prejudice. The Owners and the Manager now move, pursuant to CPLR 2221 (d) and (e), to reargue and renew their prior motion for summary judgment dismissing the complaint, or in the alternative for summary judgment granting common law and contractual indemnification against the Restaurant.

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<sup>1</sup>As noted in the prior Decision and Order of the court, by stipulation of May 20, 2010, defendant George Repetti as Executor of the Estate of John Repetti was substituted for defendant John Repetti.

The Manager seeks reargument of the prior motion (CPLR 2221 [d]) on the ground that the Court overlooked the fact that the Manager, as managing agent for the Premises, and as an agent for a disclosed principal, John J. Repetti, the owner of the premises, cannot be held liable to the plaintiff. The Manager relies on the testimony of Eran Schachaf, which established that she was in charge of the restaurant and oversaw the cleaning personnel who were responsible for cleaning the stairs and the bathrooms in the restaurant. The Manager argues that because it is not an employee of the Restaurant, it did not create the alleged condition, and it did not have any responsibility in remedying the alleged condition.

The motion to reargue is denied. The court did not overlook the Managers' conclusory allegation that "it is not an employee of the Restaurant, it did not create the alleged condition, and it did not have any responsibility in remedying the alleged condition." CPLR 2221 (d) (2) provides that a motion to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion,." In the Prior Decision, the court noted that the cause of the accident had not been discerned, and, rather than make an improper credibility determination, and accept Manager's self-serving version of the cause of the accident on summary judgment (*see S.J. Capelin Assocs. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974] [the credibility of the parties is not a proper consideration for the court on summary judgment]; *see also Creighton v Milbauer*, 191 AD2d 162, 166 [1<sup>st</sup> Dept 1993]), the court withheld judgment because the "actual cause of the accident and injury ha[d] not been determined or proven. As such, any determination as to the operation of indemnification would [have been] patently premature." Prior Decision, at 4.

The Owners seek renewal of the prior motion (CPLR 2221 [e]) on the ground that at the

time the original motion was made, the Restaurant had previously refused to permit engineer, Stanley H. Fein, P.E., to enter the subject premises to examine the subject staircase on January 20, 2010, and to prepare an affidavit in support of the original motion. On July 16, 2010, Mr. Fein was granted access and inspected the staircase leading to the basement of the Restaurant. He then prepared an affidavit wherein it was determined that there were no violations of the New York City Administrative Code that were the proximate cause of the plaintiff's accident. A copy of the sworn affidavit of Stanley H. Fein dated July 21, 2010 was submitted with the motion to renew.<sup>2</sup>

The motion to renew is also denied. CPLR 2221 (e) (2) provides that a motion to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination." Here, the "new facts" offered are based on the absolute conclusion that there is no allegation of structural defect with the subject staircase. Indeed, the submitted affidavit states that "with a reasonable degree of engineering certainty, the fact that the handrail on the subject stairs did not reach the bottom two steps of this twelve (12) step staircase was not a proximate cause of the plaintiff's accident *since the accident occurred on the sixth (6<sup>th</sup>) step from the top and was due to a wet, clear, odorless, sticky substance located in the middle of that step.*" Emphasis added. Moreover, Fein affirms that because the "steps had been painted subsequent to the date of loss of December 3, 2006[, she] was not able to measure the coefficient of friction of these steps as they existed at the time of the accident."

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<sup>2</sup>The Restaurant vehemently argues that as the Note of Issue was filed in December of 2009, any alleged refusal of the Restaurant to allow access after that date would be without gravitas. However, the court notes that the Note of Issue was vacated on June 1, 2010, and, as such, it was proper for the Restaurant to grant access to the Premises after that date.

The Prior Decision noted that: "Howard was ... descending a flight of metal stairs at the Premises to the restrooms, when he slipped and fell 'on a defective condition.' The defective condition was later described by him as a clear, wet, unknown, liquid substance smeared on the sixth step of the stairs. Howard EBT, at 25-26, 27, 59, 62. Meanwhile, the verified bill of particulars of July 7, 2008 (¶ 13) describes the defective condition as related to the environment and structure of the staircase." The new facts submitted are superfluous, and do nothing to answer the question of exactly what caused the accident.

"[T]he credibility of witnesses and the resolution of conflicting testimony are proper matters for determination by the jury." *Wiseberg v Douglas Elliman-Gibbons and Ives*, 224 AD2d 361, 362 (1<sup>st</sup> Dept 1996), citing *Swensson v New York, Albany Desp. Co.*, 309 NY 497, 505 (1956). Here, there is conflict as to the cause of the accident. As such, an issue of fact had been squarely raised, the reargument and renewal motions have done nothing to change or illuminate that matter. The court adheres to the Prior Decision.

Accordingly, it is hereby

ORDERED that the motion of George Repetti as Executor of the Estate of John Repetti, for leave to reargue his motion for summary judgment is denied; and it is further

ORDERED that the motion of Maxwell-Kates, Inc., for leave to renew its motion for summary judgment is denied.

Dated: December 22, 2010

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COUNTY CLERK'S OFFICE

ENTER:



Carol Robinson Edmead, J.S.C.