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

PRESENT: Hon. Joan A. Madden PART 11

Index Number : 105966/2009
TARNOWSKI, CHRISTOPHER
VS
GREY LAKE
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 8-19-10
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision/Order.

Dated: January 11, 2011

_____ J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

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

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CHRISTOPHER TARNOWSKI,
Plaintiff,

-against-

THE GREY LAKE INC. d/b/a METRO 53,
Defendant.

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Index No. 105966/09

Joan A. Madden, J.

In this personal injury action, defendant THE GREY LAKE INC. d/b/a Metro 53 ("Metro") moves for summary judgment dismissing the complaint against it. Plaintiff Christopher Tarnowski ("Tarnowski") opposes the motion, which is denied for the reasons set forth below.

Background

Tarnowski alleges that at approximately 1:00 a.m. on January 4, 2009, he was injured when he slipped and fell at Metro 53, a bar/restaurant/club located at 307 East 53rd Street, New York, New York ("Metro 53"). Metro owns and operates Metro 53. Metro 53 has multiple floors. The main floor has two bars, a front bar and a back bar (the "back bar""), which is also known as the brick bar.

On Saturday, January 3, 2009, Tarnowski and his girlfriend Diane Bartlett ("Bartlett") attended a birthday celebration for Christine Bartlett ("Christine"), Bartlett's cousin, that was held at Metro 53 in the area of the back bar on the main floor. Bartlett and Tarnowski arrived at Metro 53 at approximately 11:00 p.m. Tarnowski testified that he remained in the back bar area for the entire time prior to the accident, except when he exited the back bar area to go to the bathroom which was located "downstairs," which he accessed by stairs. Tarnowski dep. at 27.

Tarnowski testified that he and Bartlett decided to leave the party at around 1:00 a.m., and that the route that they intended to take to exit the bar was a flat path, except for the step to exit from the back bar. Tarnowski testified that while following this route, approximately five feet after the step, he slipped and fell backwards on a wet, sticky substance. Id. at 32-3. Tarnowski also testified that, while he was falling, he knocked into Bartlett and caused her to fall as well. Id. at 36. Tarnowski testified that the substance was clear and that, after falling on it, it covered "a good amount of [his] jeans and the back of [his] shirt." Id. at 39. He also testified that Bartlett had the substance on her clothing too. Id. Tarnowski further testified that the area was "not overcrowded," but he "had to step not to bump into anybody." Id. at 35.

Tarnowski also testified that he had seen a bouncer in the area where they fell prior to the fall, and that Bartlett indicated to him that the bouncer saw them fall. Id. at 41-42. Tarnowski testified that Bartlett helped him up and that she "had words" with the bouncer about the fall. Id. at 41. Tarnowski testified, "she didn't really have much words with [the bouncer]. I think she was more concerned about us getting in trouble for falling or whatever." Id. Tarnowski testified that neither he nor Bartlett spoke to anyone else on the staff about the accident at that time, and they did not fill out an accident report. Id. at 43. However, Bartlett told Christine and her other cousin, Mark Bartlett, about the accident before they left Metro 53. Id. at 44. Tarnowski testified that after the accident, he went home but later called an ambulance. His injuries from the accident include, among others, a fractured knee, a fractured ankle, and a fractured tibia.

Anthony Spillane ("Spillane") is the general manager of Metro 53 and has held that position since August 2000. Spillane testified that his duties include "staffing, payroll, ordering, and overseeing other employees." Spillane dep. 10. Spillane testified that he was not at Metro 53 at the time of the accident, that there were no records identifying which of "three or four different managers" was present, and that he had contacted "the three night managers that would be rotating and they had no remembrance of the accident." Id. at 26-7. Spillane also testified

that Metro 53 had no full-time bouncers, and that he did not check with any bouncers about the accident. Id. at 29.

Spillane testified that there were no records of employees who were working at the time of the accident because "we only fill out information when there's an incident. Otherwise, we don't keep records because we do a lot of guest bartending and staffing." Id. at 26-7. However, Spillane also testified that the only way he could identify who was working on a given night would be from paychecks, but that such information was not available for the night of the accident. Id. at 71-2.

Spillane testified that all staff was expected to monitor the floors at Metro 53 for any dangerous conditions. Id. at 24. On at least Thursdays through Saturdays, Metro employed floor porters ("porters") who were expected to continuously inspect the floors and clean any hazardous condition that might arise. Id. at 24-5, 35. Spillane testified that there was a certain amount of spillage on the floors every night at Metro 53 and that there was an expectation of more spillage on Friday and Saturday nights when Metro 53 was busiest and when the greatest number of porters was present. Id. at 58-59. Metro employed two or three porters on Fridays and Saturdays. Spillane testified that there was no specific training program for the porters, but that they were instructed to continuously monitor and take care of the floors in addition to responding to any specific instructions to clean a specific area. Id. at 35. There was no established schedule at Metro 53 for the performance of floor inspections.

Spillane also testified that there was a bouncer stationed by the back bar on certain days, such as Friday and Saturday nights, and it would be his duty to "monitor the crowd, and also check for bracelets that people would be receiving so there's no gate crashers," at least where the back bar is rented out exclusively for a party, which may not have been the case on the night of the accident. Id. at 28-9.

Tarnowski commenced this action against Metro by filing a summons and complaint on or about April 21, 2009. In his complaint, Tarnowski asserts a cause of action against Metro for negligence.

Metro now moves for summary judgment seeking to dismiss the complaint on the basis that there is no evidence that it caused or created the allegedly dangerous condition that caused Tarnowski to fall or that it had actual or constructive notice of it. Metro maintains that Tarnowski can provide no evidence as to where the substance came from, how long it was there, or whether anyone complained about it. Metro argues that the existence of a wet spot in and of itself does not provide the requisite notice. Metro asserts that it had done all that could be reasonably expected, having hired a greater number of porters to work on its busiest nights, Friday and Saturday nights, for the express purpose of addressing dangerous conditions on the floor.

In opposition, Tarnowski maintains that the motion must be denied because Metro failed to meet its burden of producing evidence that it did not have actual or constructive knowledge of the condition which caused Tarnowski's injury. Specifically, Tarnowski argues that Metro has failed to make this showing as it has not presented evidence of when the floor was last cleaned or inspected prior to the time Tarnowski fell, such as a set cleaning or inspection schedule. Tarnowski asserts that general cleaning practices, such as instructions to continuously maintain the floors, are not sufficient evidence of when an area was last cleaned or inspected prior to an accident. Tarnowski also maintains that Metro was negligent in failing to provide explicit instructions to the porters as to how inspections of the floor should be performed.

In reply, Metro argues that a general awareness that a dangerous condition may be present is legally insufficient to constitute notice of a particular dangerous condition. Metro also argues that Tarnowski's submission that Metro did not properly train its staff is an attempt to identify, post-note of issue, new theories of liability not previously alleged in the complaint or

the bill of particulars. Metro asserts that because of the lack of color, liquidity and viscosity of the alleged substance on which Tarnowski allegedly slipped, it would be pure speculation to suggest that the condition was visible and apparent for a sufficient length of time.

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..." Winegrad 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).

"It is well established that a landowner is under a duty to maintain its property in a reasonably safe condition under the extant circumstances, including the likelihood of injuries to others, the potential for any such injuries to be of a serious nature and the burden of avoiding the risk [citations omitted]." O'Connor-Miele v. Barhite & Holzinger, Inc., 234 AD2d 106, 106 (1st Dep't 1996). However, an "owner cannot be liable for injuries caused to a person as a result of a defective condition on the premises unless it can be shown that the owner either created the hazardous condition or had actual or constructive notice of the condition for a reasonable amount of time that in the exercise of reasonable care, the owner should have corrected it." Trujillo v. Riverbay Corp., 153 AD2d 793, 794 (1st Dep't 1989). To constitute constructive notice, a defect must be visible, apparent, and in existence for a sufficient length of time prior to an accident to permit a defendant's employees to discover and remedy it. Gordon v. American Museum of Natural History, 67 N.Y.2d 836 (1986).

As a proponent of a motion for summary judgment, Metro has the burden of demonstrating "the lack of evidence regarding how the alleged condition came into existence,

how visible and apparent it was, and for how long a period of time prior to the accident it existed." Giuffrida v. Metro North Commuter R.R. Co., 279 AD2d 403, 404 (1st Dept 2001). In so moving, "the defendant is required to make a prima facie showing affirmatively establishing lack of notice as a matter of law." Fox v. Kamal Corp., 271 AD2d 485 (2d Dept 2000).

Metro has not met this burden as it fails to provide any evidence regarding the length of time the substance was on the floor prior to Tarnowski's fall, or how often, or even whether, the floor was checked and cleaned on the night of the incident. Instead, Metro relies solely on the testimony of Spillane, who was not present on the night of the incident, as to the general practice of the porters who were supposed to continuously inspect the floors and keep them clean. Such evidence is insufficient to meet Metro's burden of showing lack of notice. See Lorenzo v. Plitt Theaters, Inc., 267 AD2d 54 (1st Dept 1999) (holding that general cleaning routines were insufficient, as a matter of law, to meet the summary judgment burden); Deluna-Cole v. Tonali, Inc., 303 AD2d 186 (1st Dept 2003) (denying summary judgment where defendant's witness submitted evidence regarding the general practice of cleaning the restaurant because it did not address "when the passageway where the plaintiff fell on . . . was last checked for spills . . ."); compare Tkach v. Golub Corp., 265 AD2d 632 (3d Dept 1999) (granting a summary judgment motion when defendant submitted evidence that the store's policy was to have its employee check the floor every ten to fifteen minutes for spills, and that an employee checked the floor of the area in question five minutes before the plaintiff's accident). As such, Metro failed to establish, as a matter of law, "that the condition had not existed for a sufficient length of time before plaintiff's accident to permit employees of [defendant] to discover and remedy it." Perrone v. Ilion Main St. Corp., 254 AD2d 784, 785 (4th Dept 1998).

Moreover, Tarnowski has provided evidence suggesting that Metro knew or should have known of the floor's condition, including testimony from Tarnowski that there was a bouncer in the area where he fell and that the substance which caused him to fall was sizeable enough to

cover a large part of his clothing as well as at least a portion of Bartlett's clothing. In addition with respect to the bouncer, while Spillane testified that it was the bouncer's job to monitor the crowd, he also testified that all staff were expected to monitor the floors for any dangerous conditions.

Under these circumstances, there are triable issues of fact as to whether Metro knew or should have known about the alleged substance on the floor which allegedly caused Tarnowski's fall. Thus, summary judgment must be denied.

Conclusion

In view of the above, it is

ORDERED that the motion for summary judgment by defendant THE GREY LAKE INC. d/b/a Metro 53 is denied and it is further

ORDERED that the parties shall appear for a pre-trial conference on February 3, 2011, at 2:30 p.m., in Part 11, room 351, 60 Centre Street, New York, New York.

Dated: January 14, 2011

J.S.C.