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

PRESENT: Hon Joan A. Madden PART 11

Justice

Index Number : 106659/2008
WILLIAMS, DORIS
VS.
TECUMSEH PROPERTIES
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____

MOTION DATE 9-19-10

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

FILED

JAN 31 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: January 24, 2010

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

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Doris Williams,

Plaintiff,

-against- Index No. 106659/2008

Tecumseh Properties, Inc. and 44th Street NYC, Inc. d/b/a Overlook,

Defendants.

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Joan A. Madden, J.:

In this personal injury action, defendant 44th St. NYC, Inc. d/b/a Overlook ("Overlook") moves for summary judgment dismissing the complaint and any cross claims against it. Plaintiff Doris Williams ("Williams") opposes the motion, which is denied for the reasons set forth below.

Background

Williams alleges that on January 19, 2008, while she was in a restaurant known as the Overlook (the "Restaurant"), located at 225 East 44th Street, New York, New York, she tripped and fell when stepping down from a raised wooden platform to the floor below (the "Platform"). Tecumseh Properties, Inc. ("Tecumseh") is the owner of the Restaurant,[1] and Overlook is the tenant that operates the Restaurant.

Williams testified that on the date of the accident, she arrived at Restaurant at 7:00 pm to celebrate her grandson's 30th birthday. Williams dep., at 10, 12. Williams contends that she was going to the ladies room as she was leaving the party with her daughter, at approximately

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1 By decision and order dated August 19, 2010, this court granted, without opposition, Tecumseh motion for summary judgment as to liability on it claim against Overlook for indemnification.

9:30-10:00 p.m., when she fell.[2] Id. at 25-26, 32-33. Williams testified that area where she fell was "very dark," and that she could not see the floor and that "[she] didn't see the [Platform]." Id. at 31-32. Williams also testified that her view of the Platform was obstructed by five or six people who were walking in front of her. Id. at 41.

Williams' daughter, Lori Simidian ("L. Simidian"), testified that she saw her mother fall straight forward when she fell off the Platform and that it was "very dark" in the Restaurant. L. Simidian dep. a 23-24, 27. Williams' son-in-law, Gary Simidian ("G. Simidian"), testified that there was poor lighting in the Restaurant, but that he did not see Williams fall, since he was waiting for her in his car. G. Simidian dep., at 23- 25.

Jeffrey Perzan ("Perzan"), a general manager at the Restaurant, describes the Restaurant as a "bi-level bar restaurant, [with] a bar on the first floor, a bar on the second floor and an outdoor bar garden."[3] Perzan dep., at 8. He testified that the Platform is in the back on the first floor, and is about six to seven inches higher than the slate floor below. Id., at 15-16. According to Perzan, the Platform has been at the Restaurant for more than 30 years but that in 2004, "the old wood was removed and replaced with new wood was put on [of] the exact same thickness." Id at 18. Perzan also testified that Overlook installed the slate floor covering that was in place at the time of the accident. Id., at 17-18. As for the lighting, Pruzan testified that there was track

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2Williams testified that earlier in the evening she went past the bar area to the dining area, and thus must have gone over the Platform before the accident. Williams dep. 17-18. However, this evidence is not dispositive as it relates only to whether Williams was negligent in failing to notice the Platform before she fell.

3 Perzan is not employed by Overlook, he is employed by Continental Human Resources, which he describes as an outsourcing firm that "handles all of the employees of the Overlook." Perzan dep. 6.

lighting on the ceilings of the area where Williams fell and that three or four switches control the approximately 30 to 40 lights on the tracks. Id., at 24-25.

According to Perzan, he had not heard about any incidents of falls or prior complaints during the five years before the accident. Id, at 25. Perzan also testified that while Overlook did have a video camera at the Restaurant, it no longer has the recording from that evening, since the camera automatically overwrites the tape and the tape was not preserved. Id., at 26.

At some time subsequent to the accident, photographs described as "Defendant's Exhibits A through F of November 17, 2008" (the "11/17/08 photos") were taken on behalf of Overlook of the area of the accident. Upon reviewing these photographs at their respective depositions, Williams, L. Simidian, and G. Simidian testified that the lighting conditions on the night of the accident were darker than those shown in the photographs. Williams dep., at 74, L. Simidian dep., at 13, 33; G. Simidian dep., at 11, 27.

Overlook moves for summary judgment dismissing the complaint against it on the grounds that the Platform was not a dangerous or defective condition, that the lighting around the Platform was adequate, that the condition on which Williams fell was open and obvious, and that Restaurant, including the Platform, is in compliance with the Building Code. Overlook also argues that it did not cause or create that condition as the Platform had been existence for years prior to its occupancy, that there were no structural changes to the Restaurant by Overlook, and that a valid Certificate of Occupancy exists for the use.

In support of its position, Overlooks submits the affidavit of Davi Valsani ("Valsani"), the assistant manager of the Restaurant. Valsani states that states that the wood flooring in the dining area and slate surface in front of the Platform provide color contrast, making the Platform

easily visible. Valsani Aff. ¶3. Valsani also states that all the lights are turned on when the Restaurant is open for business, and that it is his practice to immediately replace any bulb that goes out. Id.. ¶5. He also states that, to his recollection, all of the light fixtures were working on the night of the accident.[4] Id. Additionally, Valsani states that "the location, number and intensity of the lights present on the accident date remains the same currently." Id.

Overlooks also submits the affidavit of Rudi O. Sherbansky ("Sherbansky"), a licensed Professional Engineer. Sherbansky states that he inspected the Restaurant and reviewed the pleadings and deposition testimony. He states the Platform is 6.125 inches in height, which is "well below the maximum allowable stair height of 7.5 inches permitted by the Building Code." Sherbansky Aff. ¶ 6 He also states that contrary to the allegations in Williams' Bill of Particulars, the Platform is not in violation of Section 27-375(f) which requires handrails as it applies only to stairs and not a single step or riser. Id, ¶ 4.

As for the lighting, Sherbansky states that the first floor has track lighting on the ceiling with high intensity halogen light bulbs, and that based on the photograph marked as Exhibit B at the depositions, and the affidavit of Mr. Valsani, that "the interior lighting level at the time of my inspection were kept substantially the same as lighting levels at the time the alleged accident [and that] ceiling lighting arrangement ...was substantially the same as existed at the time of my inspection." Id, ¶ 7. Sherbansky then opined that the lighting levels of the area at the time of the

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4 Valsani states in his affidavit that the accident occurred on January 18, 2008, and states that, to the best of his recollection the lights were working on January 18, 2008. However, Williams argues in her opposition papers that Valsani's references to January 18, 2008, in his affidavit do not pertain to the night of her accident and that there may have been another accident on January 18, 2008.

accident complied with the relevant code provisions and were "above the threshold of reasonable lighting levels." Id, ¶ 8.

In opposition, Williams asserts that Overlook has failed to demonstrate with admissible evidence that it neither created the condition of the Platform nor had actual or constructive notice of its existence. Williams also asserts that there are issues of fact as to whether the Platform was adequately lit, adequately safeguarded, and open and obvious. She further argues that the Sherbansky's affidavit is "insufficient" for multiple reasons, including that Sherbansky did not identify the date of his inspection. Williams also notes that Sherbansky's report was based on photographs which according to her deposition testimony and that of daughter and son-in-law, did not reflect the lighting conditions on the evening of the accident.

Williams also submits an affidavit from Stanley H. Fein ("Fein"), a Licensed Professional Engineer. Fein performed an inspection of the Restaurant on May 26, 2010. Fein opines that at the time of the accident, the Platform was in violation of Section 27-375(f) of the New York City Administrative Code, which requires that stairs greater than 44 inches in width have handrails on both sides. Fein Aff. ¶ 6 Additionally, Fein maintains that the use of a single platform in an exit passageway is dangerous because an optical illusion is created that the upper and lower levels are the same height. Id., ¶ 6(a). He further opines that when a single platform transition must be used obvious visual cues must be provided, such as handrails, caution signs, platform lighting, or at least yellow caution tape on the front of the bull nose portion of the platform .Id., ¶ 6(b).

He also opines that the illumination in the area of the Platform was 1.8 footcandles and that this level of lighting violated Section 27-381 of the New York City Administrative Code,

which requires lighting of at least 2 footcandles, measured at floor level during occupancy in exits and their access facilities.[5]

In reply, Overlook argues that Fein's affidavit is inadmissible as Williams did not disclose her intention of presenting an expert witness regarding the issue of liability until after she filed the note of issue and certificate of readiness. Overlook further argues that there is no basis for this court to qualify Fein as an expert witness because his qualifications to render an expert opinion, which he states are set forth in his curriculum vitae which he attaches to his affidavit, are not before the court. Overlook further asserts that the code violations which Fein cites are not applicable to the circumstances of this case.

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 N.Y.2d 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 N.Y.2d 320, 324 (1986). "Is it well established that a landowner (or possessor of property) 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

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5Fein also relies on Administrative Code sections 27-127 and 27-128 to argue that Overlook owes a duty to safely maintain its premises; however, these provisions are too general to provide a basis for liability.

106 (1st Dept 1996). In order for an owner to be held liable for injuries caused to a person as a result of a defective condition on the premises, it must be shown that " the owner or possessor either created the condition, or ha[d] 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).

Assuming *arguendo* that Overlook has submitted evidence sufficient to establish prima facie proof that the Platform was not defective and the area around it was sufficiently lit, Williams has controverted this showing based, *inter alia*, on her deposition testimony that she fell because she did not see the Platform and that the area around the Platform was dark. Moreover, Williams as well her daughter and son-in-law testified that the photographs of the area shown to them during their deposition did not accurately depict the illumination of the area which was darker on the night of the accident. Such evidence is sufficient to raise a triable issue of fact as to whether Overlook's failure to mark the Platform or otherwise warn of the change in elevation level, together with the level of lighting in the area, created an unreasonably dangerous condition for which Overlook can be held liable. Chafoulis v. 240 E. 55th Street Tenants Corp., 141 AD2d 207 (1st Dept 1988)(trial court erred in dismissing action when plaintiff fell down stairs that were unmarked and near an entrance door and thus fact issue existed as to whether configuration created an optical confusion); Scher v. Stropoli, 7 AD3d 777 (2d Dept 2004)(plaintiff's testimony that she failed to detect the elevation difference between a single step riser in private dining area where the tiles were identical and the area was dimly lit raise a triable issue of fact); Freidah v. Hamlet Golf and Country Club, 272 AD2d 572, 573 (complaint against defendant should not have been

dismissed when there were triable issues of fact as to whether inadequate lighting created or helped to create a dangerous condition).

In addition, contrary to Overlook's argument, that the Platform was in existence prior to Overlook's tenancy is insufficient to relieve it of its "continuing duty to maintain its property in a reasonably safe manner." Swerdlow v. WSK Properties Corp., 5 AD3d 587, 588 (2d Dept 2004). Moreover, Overlook's potential liability is based not only on the dangerous condition of the Platform, but also on allegations that the lighting was inadequate in the area of the Platform.

Furthermore, Overlook argument that it is entitled to summary judgment as the Platform constitutes an "open and obvious" condition is without merit. The issue of "whether a condition is open and obvious is generally a jury question and the court should only determine that a risk was open and obvious as a matter of law when the facts compel such conclusion." Westbrook v WR Activities-Cabrera Mkts., 5 AD3d 69, 72 (1st Dept 2004). Here, it cannot be said as a matter of law that the Platform was an "open and obvious" condition, particularly as Williams testified that she did not see it before she fell and that the area around the Platform was dark. See e.g., Thornhill v. Toys "R" Us NYTEX, Inc., 183 AD2d 1071 (3d Dept 1992)(finding that based on the surrounding circumstances it could not be determined as a matter of law that the raised platform over which plaintiff fell was an open and obvious condition).

Next, contrary to Overlook's position, the court may consider Mr. Fein's affidavit despite Williams' failure to previously identify him as an expert since there is no indication that such failure "was intentional or willful and there is no showing of prejudice" to Overlook. Hernandez-Vega v. Zwanger-Pesiri Radiology Group, 39 AD3d 710, 711 (2d Dept 2007); see also Busse v. Clark Equipment Co., 182 AD2d 525 (1st Dept 1992). In addition, the court finds that the expert

building code, the owner and possessor of the property still owed a duty to maintain the property in a reasonably safe condition).

Accordingly, as the record raises issues of fact as to whether the Platform and the alleged lack of adequate illumination created a dangerous and/or defective condition such that Overlook violated its duty to maintain the Restaurant in a reasonably safe condition, summary judgment must be denied.

Conclusion

In view of the above, it is

ORDERED that the motion for summary judgment by defendant 44th Street NYC, Inc. d/b/a Overlook is denied; and it is further

ORDERED that the parties shall appear for a pre-trial conference on March 3, 2011 at 4:00 pm in Part 11, room 351, 60 Centre Street, New York, NY.

Dated: January 26, 2011

J.S.C.