

Deerr v Siracusa

2011 NY Slip Op 30715(U)

March 24, 2011

Sup Ct, Richmond County

Docket Number: 100243/09

Judge: Joseph J. Maltese

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF RICHMOND DCM PART 3

Index No.:100243/09
 Motion No.:001

CLAIRE DEERR,

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

MARIO S. SIRACUSA,
 CARMELA SIRACUSA,
 ROSE MARIE TOTO,
 BELLA ANA PIZZERIA & RESTAURANT, INC.,
 d/b/a LENTO'S RESTAURANT, and
 289 NEW DORP CORP.,
 d/b/a LENTO'S RESTAURANT,

Defendants

The following items were considered in the review of the following motion for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Memorandum of Law In Support of Motion	2
Answering Affidavits	3
Replying Memorandum of Law	4
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendant, Rose Marie Toto, moves for summary judgment dismissing the plaintiff's complaint and granting her summary judgment on her cross-claims against Bella Ana Pizzeria & Restaurant, Inc., d/b/a Lento's Restaurant and 289 New Dorp Corp., d/b/a Lento's Restaurant. The defendant's motion is denied in its entirety.

Facts

This is an action to recover for personal injuries as a result of a trip and fall in front of the premises located at 289-291 New Dorp Lane, Staten Island, New York. The plaintiff alleges that she tripped and fell over a ramp leading to the entrance/exit of Lento's Restaurant.

At the time of the plaintiff's accident Rose Marie Toto owned the premises. Toto testified that she became the sole owner the premises in or about 2006. The premises was previously owned by Joseph Toto, John Toto and Marie Delong. On January 30, 1997 John Toto leased the premises to Crocitto's Incorporated. On October 12, 1999, Crocitto's Incorporated assigned the January 30, 1997 lease to Bella-Ana, Inc. with the approval of John Toto as landlord. Subsequently, Bella-Ana, Inc. assigned the January 30, 1997 lease to Linda Cahill, again with the approval of John Toto as landlord. Rose Marie Toto testified that the ramp at issue in this case existed before she became the sole owner of the property.

Paragraph eight of the lease agreement states as follows:

The Landlord shall not be responsible for the loss of or damage to property, or injury to persons, occurring in or about the demised premises by reason of any existing or future condition, defect, matter or thing in the said demised premises or the property of which the premises are a part, or for the acts, omissions or negligence of other persons or tenants in and about the said property. The Tenant agrees to indemnify and save the Landlord harmless from all claims and liability for leases of or damage to property or injuries to persons occurring in or about the demised premises.

It is also conceded that the landlord reserved the right to enter the premises for purposes of inspection and repair.

The plaintiff's bill of particulars states that "[t]hose ordinances, regulations and statutes

violated by the defendant are left to be determined by the Trial Court and will judicially notice at the time of trial.” In opposition, to the defendant’s motion for summary judgment, the plaintiff submits the affidavit of Alphonse J. Valvanico, P.E. who avers that there was a violation of N.Y.C. Building Code § 27-307. The co-defendants Bella Ana Pizzeria & Restaurant, Inc., d/b/a Lento’s Restaurant and 289 New Dorp Corp., d/b/a Lento’s Restaurant submit no opposition to the motions. Additionally, while the plaintiff’s opposition papers reference the deposition transcript of Linda Cahill it is not annexed. Therefore, that portion of the plaintiff’s opposition relying Linda Cahill’s deposition transcript will be disregarded by this court.

Discussion

“Mere speculation as to the cause of a fall, where there can be many causes, is fatal to a cause of action.”¹ To establish a prima facie case a plaintiff is, “. . . required to present proof that the defendant either created or had actual or constructive notice of the defective condition which allegedly caused her to fall . . . To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant’s employees to discover and remedy it.”² In the case of an out of possession landlord that reserved a right of re-entry in the lease the plaintiffs must allege a statutory violation or significant structural or design defect.³

The ramp at issue is used in place of an 8.5 inch step in front of Lento’s Restaurant. In opposition to Toto’s motion for summary judgment the plaintiff argues there was a specific violation of the section 27-307 New York City Building Code (the “Code”) that states:

No part of a new building, or of any alteration or addition to an

¹ *Garvin v. Rosenberg*, 204 AD2d 388, [2d Dept 1994].

² *Capraro v. Staten Island Univ. Hosp.*, 245 AD2d 256, [2d Dept 1997].

³ *Pantaleon v. Lorimer Management Corp.*, 270 AD2d 324, [2d Dept 2000].

existing building, shall be constructed to extend beyond the street line, except as specifically provided in this subchapter.⁴

The type of ramp outside the entrance/exit to Lento's Restaurant must comply with section 27-308 of the Code and the applicable reference standard RS 4-6. The defendant does not dispute the configuration and location of the sloped ramp, but instead argues that the ramp is not used as an "exit" and therefore the Code is not applicable.

"Exit" is defined by the Code as, "

A means of egress from the interior of a building to an open exterior space which is provided by the use of the following, either singly or in combination: exterior door openings, vertical exits, exit passageways, horizontal exits, interior stairs, exterior stairs, fire towers or fire escapes; but not including access stairs, aisles, corridor doors or corridors.⁵

The photographs submitted by the movant depict the ramp leading to a parallel door leading to the entrance/exit to Lento's Restaurant. This picture belies the defendant's initial contention that this ramp does not lead from the interior of the premises to an open exterior space. Furthermore, *Parasconda v. Seaport Redvelopment Corp.*⁶, the decision from Kings County Civil Court cited by the moving defendant has a distinguishable set of facts. In *Parasconda*, the plaintiff testified that he "slipped and fell on fish slime while wheeling a hand truck" up a ramp. In that case the plaintiff alleged violations of the Administrative Code and submitted the affidavit of a professional engineer who concluded, "the ramp was too steep, was missing handrails and did not have a non-slip surface." Here, the plaintiff is not alleging that she slipped while walking up a ramp. Instead, the plaintiff is claiming that she tripped over a ramp.

⁴ NYC Code § 27-307.

⁵ NYC Code § 27-232.

⁶ *Parasconda v. Seaport Redevelopment Corp.*, NYLJ, Jan. 6, 2003, at 27, col 4, [Civ Ct Kings County].

The plaintiff argues that the moving defendant violated New York City Administrative Code § 308 which covers ramps providing access to individuals who use wheelchairs. Alphonso J. Calvanico, P.E. submits an affidavit that states the maximum allowable slope for such a ramp is 1:10 or 10%. Here, Calvanico avers that the side slope in front of Lento's Restaurant is 1:1 or 8 inches to 8.5 inches, thereby creating a hazardous condition and a violation of the Administrative Code.

The moving defendant initially did not dispute the "configuration and location of sloped area," but then in reply to the plaintiff's expert state that, "the defect at issue here, a specified condition concerning a ramp providing entry into the leased premises." Here, the moving defendant has not demonstrated that she is entitled to a judgment as a matter of law. While the Appellate Division, Second Department did affirm a trial court's determination dismissing the complaint in *Patrick v. Cho's Fruit & Vegetables*, the court reasoned that "the sidewalk was wet was not sufficient to establish a dangerous condition."⁷ Here, whether the alleged long term condition of a sloped ramp which is alleged to be a violation of the New York City Administrative Code § 308, is an issue of fact. As such, the defendant's motion is denied.

Accordingly, it is hereby:

ORDERED, that Rose Marie Toto's motion for summary judgment is denied in its entirety; and it is further

ORDERED, that parties appear before Justice Philip G. Minardo in Jury Coordinating Part 8 on **Monday, June 20, 2011 at 9:30 a.m.**

ENTER,

DATED: March 24, 2011

⁷ 248 AD2d 692, [2d Dept 1998].

Joseph J. Maltese
Justice of the Supreme Court