

Laccone v Roslyn Chalet

2011 NY Slip Op 31768(U)

June 21, 2011

Supreme Court, Nassau County

Docket Number: 20685/08

Judge: Ute W. Lally

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SCAN

SHORT FORM ORDER

SUPREME COURT – STATE OF NEW YORK
COUNTY OF NASSAU – PART 3

Present: HON. UTE WOLFF LALLY
Justice

NEIL LACCONE and CONSTANCE LACCONE,

Plaintiffs,

MD, MG, MD
Motion Sequence #4, #5, #6
Submitted April 21, 2011

-against-

INDEX NO: 20685/08

THE ROSLYN CHALET a/k/a CHALET RESTAURANT
& TAP ROOM and SALATA REST. CORP.,

Defendants.

The following papers were read on this motion for summary judgment:

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Upon the foregoing papers, it is ordered that this motion by defendant Salata Restaurant Inc. i/s/h/a The Roslyn Chalet a/k/a Chalet Restaurant & Tap Room and Salata Rest. Corp. (hereinafter referred to as "the Chalet") for an order pursuant to CPLR 3212 granting summary judgment in movant's favor dismissing the complaint is denied. Motion by the Chalet for an order pursuant to CPLR 3042(b) precluding plaintiffs from alleging new theories of liability and negligence in this matter via a belatedly served "Supplemental" Bill of Particulars is granted. Cross-motion by plaintiffs Neil Laccone and Constance Laccone

for an order pursuant to CPLR 3025(b) for leave to serve a Second Supplemental Bill of particulars *nunc pro tunc* is denied.

On October 20, 2006 at approximately 11:30 p.m., plaintiff Neil Laccone allegedly tripped and fell at the Chalet located at 5 Railroad Avenue, Roslyn, New York. In the Bill of Particulars, the plaintiff alleges that he "tripped and fell on a wet deck that was covered with leaves and the portion of decking plaintiff walked upon gave way due to rot and plaintiff's right foot went through the decking and his left foot slipped on the leaves and he fell forward down two flights of steps."

The Second Supplemental Bill of Particulars, plaintiff alleges that "[t]he hazardous and dangerous conditions was that the two small steps exiting the restaurant, the first one with a riser height of 1.125 inches from the wood flooring down to the threshold and the second one from the threshold with a riser height of 3.75 inches down to the carpet pad created a tripping hazard for pedestrians, the threshold was steeply sloped and worn, the handrail was not usable in that it consisted of a 5.5 inch wide board that was impossible to grab, and the carpet pad on the wood deck and the presence of wet leaves created a slippery surface."

On January 6, 2010, plaintiff testified at his examination-before-trial. Thereafter, on March 17, 2010, plaintiff executed an errata sheet on which he made various changes to his examination-before-trial transcript. On June 22, 2010, plaintiff submitted an affidavit setting forth a generalized statement of the reason for the changes to the transcript. Thereafter, defendants moved for an order pursuant to CPLR 3116 striking the errata sheet annexed to plaintiff's executed examination-before-trial or in the alternative, directing plaintiff to submit an affidavit setting forth a statement of each individual reason for each

change plaintiff had made to his deposition transcript. By order dated October 4, 2010, this Court granted defendants' motion as to the alternative relief requested. On October 26, 2010, plaintiffs served the Note of Issue to the attorneys for the defendants.

Notably, plaintiff never changed any of his testimony with regard to his claim that it his foot went through decking, and that he slipped on wet leaves. Plaintiff only changed that portion of his original testimony wherein he denied that his accident occurred while stepping outside the door onto the deck and instead indicated that he was standing on the deck for five minutes when his foot went through the deck and then he slipped on leaves.

Defendants seek summary judgment on the grounds that they had no notice of the alleged wet leaves and rotting wood on the upper level of its deck, and also upon the video surveillance footage depicting the specific manner in which the accident occurred. Defendants assert that the video footage completely contradicts plaintiff's claim as far as the alleged presence of a rotting deck and wet leaves causing his fall.

In addition to the video surveillance tape, defendants rely upon the transcripts of testimony of Neil and Constance Laccone; Dr. Deckler, a dentist who knew plaintiff as a colleague for over 20 years; and Kevin Dursen, the sole shareholder of Chalet Restaurant Corp., which is the owner of the Chalet Restaurant, and the subject premises owned by Burder Realty, which is another company owned by Mr. Dursen. Burder purchased the property in 1997 at which time Salata Restaurant Corp. then opened the Chalet Restaurant.

At his examination-before-trial, Mr. Dursen testified, in pertinent part, that: "Prior to this incident no person had ever fallen in the area. Thousands of persons would have exited the upper level door to the upper level deck since Mr. Dursen purchased the

restaurant and property. Mr. Dursen received no complaints about the step down. He is aware that plaintiff is alleging to have slipped on wet leaves and fallen because of rotting wood on the deck. However, prior to the plaintiff's accident he had never been aware of any problems with leaves being present in the area, nor any rotting wood nor discovered any such rotting on the deck since the accident up until the present. After the accident occurred, Mr. Dursen also never observed the presence of any rotting wood or wet leaves on the deck that could have caused the plaintiff to fall. Mr. Dursen asserts that the foregoing is completely supported by the videotape of the accident showing plaintiff to have fallen simply because his right leg gave out with no evidence of wet leaves and/or rotting deck having caused the plaintiff's accident."

Mr. Dursen did not witness the plaintiff's accident. However, the whole accident was caught on infra red video maintained at the restaurant in the regular course of business, which was saved by Mr. Dursen after the accident and is annexed to this motion. There were numerous cameras placed in the restaurant for security purposes. The tape is digitally stored and recorded over once a month. Mr. Dursen, however, maintained a copy of the recording of the accident. The cameras are night vision cameras with cameras recording all day on detection of motion. There was one camera specifically in the area of the accident by the exterior door.

The Chalet argues that the video footage depicting the entire accident as it occurred establishes that plaintiff's accident occurred as his right foot came through the doorway and down onto a mat on the deck, with the right foot then giving out thereby causing plaintiff to fall. Plaintiff had undergone surgery on his hip in August, 2006, two months prior to the accident. Regardless of the actual cause for plaintiff's right leg giving out, the video

tape shows plaintiff did not slip on wet leaves and he did not fall because his feet went through a rotting deck.

The videotape also refutes the testimony as well as the claims made by plaintiff Constance Laccone and Bruce Deckler that they were caused to slip on the deck as well. Dr. Bruce Deckler testified that the deck cracked and/or that there was a dip in the deck which could have caused plaintiff to have fallen. Simply stated, defendants maintain that the testimony of the plaintiffs and Bruce Deckler are incredible and summary judgment should be granted as there is no evidence that plaintiff fell as a result of any alleged defective condition, specifically a rotting deck and/or slippery leaves, or even slipped, given the videotape of the entire occurrence. It has been held that testimony that is flatly contradicted by photographic evidence cannot even support a jury verdict and must be deemed incredible as a matter of law. (*Annunziata v Colasanti*, 126 AD2d 75).

In opposition to defendants' motion, plaintiff argues that conflicts between plaintiff's errata sheet changes and the original deposition testimony raise an issue of credibility that cannot be resolved on a motion for summary judgment. (*Nye v Putnam Nursing & Rehab Ctr.*, 62 AD3d 767). Plaintiff further asserts that notice of the defective condition is not a prerequisite to establish liability on behalf of a property owner as it has a non-delegable duty to maintain the premises in a reasonable safe condition. (*Basso v Miller*, 40 NY2d 233).

Plaintiffs also rely upon a belatedly served expert disclosure and Second Supplemental Bill of Particulars, which allege new theories of negligence against defendants (see Affidavit of Peter Pomeranz, a Professional Engineer). As noted above,

these documents were served after the Note of Issue was filed.

“Although leave to amend a pleading ‘shall be freely given in the absence of surprise or prejudice, the determination whether to grant such leave is within the court’s discretion, and the exercise of that discretion will not be lightly disturbed.’ ” [*Alrose Oceanside, LLD v Mueller*, 81 AD3d 574, quoting *Comsewogue Union Free School Dist. v Allied-Trent Roofing Sys., Inc.*, 15 AD3d 523, 524, quoting CPLR 3025(b)]. “[W]here the application for leave to amend is made long after the action has been certified for trial, ‘judicial discretion in allowing such amendments should be discreet, circumspect, prudent and cautious.’ ” (*Alrose Oceanside, LLC v Mueller, supra*, quoting *Morris v Queens Long Is. Med. Group, P.C.*, 49 AD3d 827, 828).

Further, “[l]eave to amend should not be granted where the proposed amendment is palpably insufficient as a matter of law or is totally devoid of merit” (*Schwartz v Sayah*, 83 AD3d 926; *Jenal v Brown*, 80 AD3d 727).

Plaintiffs’ unreasonable delay in seeking leave, as well as the absence of an excuse for the delay, warrants denial of leave to serve a Second Supplemental Bill of Particulars alleging a new theory of negligence, after the Note of Issue has been filed. (See *Cohen v Ho*, 38 AD3d 705; *Glickman v Beth Israel Medical Center Kings Highway Div.*, 309 AD2d 846).

Plaintiffs’ new theory of negligence includes the following: defendant created a defective condition in that the subject doorway and stairway violated several sections of the Building Code of New York State, the two small steps exiting the premises created a tripping hazard for pedestrians; and a handrail was not “usable” and impossible to grasp.

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“While modern practice permits a plaintiff to successfully oppose a motion for summary judgment by relying on a unpleaded cause of action which is supported by the plaintiff’s submission.” (*Yousefi v Rudeth Realty, LLC*, 61 AD3d 677; *Gallelo v MARJ Distributors, Inc.*, 50 AD3d 734; *Medina v Sears, Roebuck and Co.*, 41 AD3d 798, quoting *Comsewogue Union Free School Dist. v Allied-Trent Roofing Sys. Inc.*, 15 AD3d 523), plaintiffs’ delay in presenting the new theory of liability by way of a Second Supplemental Bill of Particulars, served after the Note of Issue has been filed, warrants our rejection of the argument. (*Medina v Sears Roebuck & Co.*, *supra*; see *Mainline Elec. Corp. v Pav-Lak Indus., Inc.*, 40 AD3d 939). As noted above, this new theory was alleged for the first time in opposition to defendants’ motion.

This Court will now address the merits of defendants’ motion for summary judgment.

It is well settled that “[a] defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a *prima facie* showing that it did not create the hazardous condition that allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it” (*Cusack v Peter Luger, Inc.*, 77 AD3d 785, 786; *Steisel v Golden Reef Diner*, 67 AD3d 670, 671; see, *Rivera v 2160 Realty Co., L.L.C.*, 4 NY3d 837, 838; *Gordon v American Museum of Natural History*, 67 NY2d 836]; *Arslan v Richmond North Bellmore Realty, LLC*, 79 AD3d 950, 951; *Weeman v Rouse SI Shopping Center, LLC*, 79 AD3d 855).

“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” (*Gordon v American Museum of Natural History*, *supra*, at p.

837; *Nelson v Cunningham Associates, L.P.*, 77 AD3d 638; *Viera v Riverbay Corp.*, 44 AD3d 577, 579; see also, *Rivera v 2160 Realty Co., L.L.C.*, *supra*).

"Whether a dangerous or defective condition exists on the property of another so as to create liability depends on the circumstances of each case and is generally a question of fact for the jury." (*Perez v 655 Montauk, LLC*, 81 AD3d 619; see also *Trincere v County of Suffolk*, 90 NY2d 976, 977). Where photographs demonstrate the alleged defect was too trivial to be actionable, defendants' motion for summary judgment should be granted. (*Dick v Gap, Inc.*, 16 AD3d 615; *Taussig v Luxury Cars of Smithtown, Inc.*, 31 AD3d 533).

Viewing the evidence in the light most favorable to plaintiff (*Taylor v Rochdale Village Inc.*, 60 AD3d 930; *Judice v DeAngelo*, 272 AD2d 583; *Robinson v Strong Memorial Hosp.*, 98 AD2d 976), plaintiff has raised an issue of fact sufficient to defeat the motion. At bar, Dr. Deckler testified at his examination-before-trial that the floor was very "slippery;" and it was "damp or wet." Dr. Deckler further testified that there was something wrong with the floor as "it seemed like there was a dip in the floor or a crack in the floor as soon as you stepped out of the door."

Further, the conflict between the original deposition testimony of plaintiff and the corrections he submitted in the errata sheets raise an issue of credibility which may not be resolved on the motion for summary judgment. (*Nye v Putnam Nursing Rehabilitation Center, supra*; *Breco Environmental Contractors, Inc. v Town of Smithtown*, 31 AD3d 359, 360).

In view of the foregoing, the defendant's motion for summary judgment is denied. The defendant's motion to preclude is granted, and the plaintiffs' cross-motion for leave to serve a Second Supplemental Bill of Particulars is denied.

Dated: JUN 21 2011


UTE WOLFF LALLY, J.S.C.

TO: Dell, Little, Trovato & Vecere, LLP
Attorneys for Plaintiffs
5 Orville Drive, Suite 100
Bohemia, NY 11716

White & McSpedon, PC
Attorneys for Defendants
875 Avenue of the America, Suite 800
New York, NY 10001

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JUN 23 2011
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