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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

DORIS LING-COHAN
J.S.C.

PRESENT: _____ Justice

PART 36

Herring
-v-
Bar 9, et al

INDEX NO. 102985/2010

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2

Answering Affidavits — Exhibits _____ | No(s). 3

Replying Affidavits _____ | No(s). 4, 5, 6, 7, 8

Upon the foregoing papers, it is ordered that this motion is for summary judgment by defendants (interim orders dated 1/7/11, 6/12/11, 7/20/11) is denied in accordance with the attached memorandum decision.

FILED
JAN 18 2012
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 1/11/12

DORIS LING-COHAN J.S.C.
J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 36

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JOHN HERRING,

Plaintiff,

-against-

Index 102985/08

Motion Seq. No.: 002

BAR 9, BAR NINE and ORA, LLC

Defendants.

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DORIS LING-COHAN, J.:

In this personal injury action, defendants 807 Restaurant Assoc., Ltd d/b/a Bar Nine i/s/h as Bar 9, Bar Nine and Ora, LLC (Bar Nine, or defendants), move, pursuant to CPLR 3212, for an order granting them summary judgment dismissing plaintiff's complaint.

Plaintiff, John Herring (Herring), alleges that, at or about 10:00 P.M. on the evening of May 16, 2005, he sustained serious physical injuries when he tripped and fell at "Bar Nine," a bar/restaurant which is located at 807 9th Avenue, in Manhattan. According to Herring, his accident occurred when he tripped at the top of a short flight of steps, while he was on his way to locate a bathroom.

On or about February 7, 2008, plaintiff commenced the instant action to recover damages for the injuries he allegedly sustained to his right shoulder when he fell. On or about May 21, 2008, issue was joined by service of defendants' answer, with affirmative defenses, and discovery, based upon the pleadings, commenced.

The complaint, as amplified by the bill of particulars, charges defendants with: (1) permitting the subject "steps/stairs/stairway" to become and remain dirty, dilapidated, slippery, slick and in a trap-like condition; (2) failing to provide either a railing or handrails; (3) failing to provide adequate lighting in the area of the steps; and (4) failing to warn customers of the dangers

associated with these conditions and/or failing to reroute customers away from this dangerous area. During their discovery period, the parties exchanged documents and took oral depositions of both Herring and the manager of Bar Nine, Kieran Blake (Blake), after which plaintiff filed the note of issue.

At their respective depositions, Herring and Blake testified to the following. Herring testified that he went to Bar Nine on the evening of May 16, 2005. Approximately an hour and a half after he arrived, Herring went to find a bathroom, which, at Bar Nine, requires customers on the main level to walk up steps to the raised part of the back bar (the raised area), walk through a hallway, and down a second, short flight of steps to reach the actual facility. Herring alleges that when he reached the top step of the stairway, his foot got caught on a rug, causing him to lose his balance and fall forward.

At his deposition, Herring testified that "[w]hile walking up the stairs to go to the bathroom my foot became lodged under a raised rug and my foot stayed and the rest of my body kept going and I fell and braced my fall and my right shoulder dislocated" (Herring Dep., at 16 - 17). He stated that there was a rug lying on the floor at the top of the steps which he described as a patterned "area type rug that could be moved" (*id.* at 18). He also testified that after he fell, he looked back to see what caused his fall and he saw the rug. He noted that it was "rolled a bit from where the foot got caught under" (*id.* at 23). He acknowledged that, prior to falling, he did not notice the particular condition, the rolled rug edge, that allegedly caused his fall, nor was he able to state whether there were handrails along the steps. Herring testified that "the lighting overall in the bar was dark" and that the area where he fell was "darker", "not a well lit area" (*id.*

at 24 - 25).

At defendants' deposition, Blake stated that he has been the only manager of Bar Nine since September 2004. He explained that he is the individual responsible for ordering inventory, staffing, daily maintenance, and for the general oversight of the bar/restaurant, and that he is also the individual to whom reports would be made regarding any accidents or incidents occurring on Bar Nine's premises. Blake did not recall, nor did he maintain any paper work which would indicate who was working at Bar Nine on the evening of May 16, 2005. Significantly, Blake could not state definitively that he was at the bar on the night of the incident or attest to the last time the raised area was checked.

With respect to the raised area, Blake described it as having a kitchen, a long hallway (approximately 40 feet long) with several arrangements of tables with couches, and an alcove. The first couch and table grouping was some 20 feet away from the steps, and the last grouping was approximately 60 feet from the steps. He stated that the furniture was arranged in this manner back in May 2005, and that old Persian rugs were laid beneath the furniture. He also stated that customers are not permitted to move the furnishings around and that he was not aware of any instance when any of the Persian rugs were moved out of place. He confirmed that the path from the main level to the bathroom required customers to walk up to the raised area. He stated that the stairway has three steps, a single brass handrail on one side, and a light fixture directly above. He was uncertain whether the wattage of the one bulb in the fixture was a 45-, 60- or 90-watt bulb, but he was able to confirm that the light fixture, which does not have a

dimmer, is always on when the bar is open. He also stated that the steps receive additional light from the other lights in the bar (Blake Dep., at 22), and insisted that the rugs were not kept anywhere near the steps.

Based on his deposition testimony, plaintiff claims that the proximate cause of his injuries was, *inter alia*, the condition of a rug placed by the edge of the steps, as well as the inadequate lighting. His claim as to notice (constructive, not actual) is that the allegedly defective rug and the inadequate lighting were visible and apparent and remained in an unsafe condition for a sufficient length of time prior to his accident to permit defendants' employees to notice and remedy the problem (*see Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]). Defendants deny the existence of an unsafe condition and, in the alternative, they deny both actual and/or constructive notice of any such condition.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR § 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Winegrad v NYU Medical Ctr.*, 64 NY2d 851, 853 [1985]). A defendant does not carry its burden in moving for "summary judgment by pointing to gaps in plaintiff[s'] proof", but must affirmatively demonstrate the merit of its claim or defense. *Bryan v 250 Church Assoc., LLC,* 60 AD3d 578 (1st Dept 2009)(citation omitted); *see also Torres v Industrial Container*, 305 AD2d 136 (1st Dept 2003). Further, to grant

summary judgment it must be clear that no material and triable issue of fact is presented *(see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The "court should draw all reasonable inferences in favor of the non-moving party and should not pass on issues of credibility" (*Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 [1st Dept 1990]).

In a slip and fall case, a plaintiff must show the existence of a dangerous or defective condition and that the defendant created the condition or had actual or constructive notice of it *(see Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]*; King v JNV Limited*, 275 AD2d 733, 734 [2d Dept 2000]; *Rubin v Cryder House*, 39 AD3d 840 [2d Dep't 2007];]*; Prisco v Long Island University*, 258 AD2d 451, 451-452 [2d Dept 1999]). "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*, 67 NY2d at 837).

Here, plaintiff's allegations of negligence are based on constructive, rather than actual notice, and, thus, *at trial*, plaintiff would need to prove that the alleged defects were "visible and apparent and...exist[ed] 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 Hist*ory, 67 NY2d 836, 837 [1986]). However, on this motion for summary judgment filed *by defendants, it is defendants' burden to prove,* by the submission of admissible evidence, that they did not in fact have constructive notice of the alleged defects, by demonstrating that the alleged defects either, did not exist, or did not exist for a sufficient length of time prior to

plaintiff's accident to permit them to discover and remedy them. Upon the within submissions, as detailed below, defendants have not satisfied their burden.

In seeking summary judgment, defendants argue that, even if there was a dangerous condition involving the allegedly dilapidated steps or the hazardous rug or inadequate lighting, which they deny, there is no evidence that they knew of, or received complaint about such alleged conditions. They further contend that, even if plaintiff did trip and fall due to a rolled edge on a rug, the happening of the event does not, by itself, demonstrate that an unsafe condition existed for a sufficient length of time to permit defendants or their employees to discover and remedy the situation. These arguments, however, which, in essence, point to alleged gaps in plaintiff's proof, do not satisfy defendants' burden of establishing entitlement to judgment of dismissal as a matter of law. As noted above, defendants cannot simply point to perceived gaps in the plaintiffs' proofs in order to prevail on a motion for summary judgment. *See Bryan v. 250 Church Assoc., LLC,* 60 AD3d at 578; *Torres v. Industrial Container*, 305 AD2d at 136.

As stated, since this is defendants' motion, it is defendants who have "the initial burden of making a prima facie case [showing] that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it." *Bruk v Razag, Inc.*, 60 AD3d 715 (2nd Dept 2009). To sustain their burden, defendants must offer evidence as to when the area in question was last inspected prior to the accident. *Id.* at 715 (stating that where defendant "did not submit evidence as to when the floor was last inspected prior to the plaintiff's accident . . . it is not necessary to consider the

sufficiency of the plaintiff's opposition papers"). Likewise, as to the negligent lighting claimed by plaintiff, defendant, as the movant, has the burden to show that the lights were adequate at the time of the accident. *Goldfarb v Kzichevsky*, 280 AD2d 583 (2d Dep't 2001); *Rivas v Waldbaums Supermarket*, 247 AD2d 600 (2d Dep't 1998). Defendants have offered no such evidence with respect to the allegedly defective conditions.

In fact, defendants' only witness, Blake, testified that he was not certain that he was in fact at the bar on the day of the incident, and offered no evidence, paper or otherwise, as to when the area was last inspected, prior to plaintiff's fall. There is no record of who was working at the bar that evening, and Blake testified that the area of the fall is not maintained on a daily basis. Significantly, defendants have not offered testimony from any employees or witnesses who were actually present at the bar, on the date of the incident, to establish that the rug was properly placed and the staircase adequately lit, at the time of plaintiff's fall. Therefore, defendants have failed to meet their burden on their motion.

While defendants focus on Herring's testimony that, prior to his fall, he was looking straight ahead as he walked up the stairs and he did not notice the rug or the condition of the rug until after his fall, claiming that plaintiff failed to put forth definitive evidence for the cause of his fall, this court disagrees. The cases relied upon by defendants, *Londner v Big v Supermarkets, Inc.*, 309 AD2d 1122 (3d Dep't 2003) and *Kwitny v Westchester Towers Owners Corp.*, 47 AD3d 495 (1st Dep't 2008), are distinguishable in that plaintiff in this case has provided substantially more details regarding the circumstances of his fall than either of the plaintiffs in

the cases cited by defendants. In *Londner*, the plaintiff could offer no more evidence than that a "little black thing" caused her to fall. *Londner v Big v Supermarkets, Inc.*, 309 AD2d 1122. In *Kwitny*, the plaintiff slipped and fell on carpet, but never looked at the condition of the carpet before or after the fall. Here plaintiff has identified a specific reason for his fall, namely the condition of the carpet, which he looked at immediately after the fall, as well as the lighting. Plaintiff has not been vague about the reason for his fall, which he learned after he fell. Further, any issues as to credibility should not be resolved by the court, but, rather, are best reserved for the trier of facts. *See S.J. Capelin Assoc., Inc. v Globe Manufacturing Corp.*, 34 NY2d 338 (1974).

Accordingly, it is

ORDERED that defendants' motion for summary judgment is denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiff serve a copy upon defendants, with notice of entry.

Dated: January 11, 2012

DORIS LING-COHAN, J.S.C.

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check of Appropriate: [ ] DO NOT POST [ ] REFERENCE

[ ] SUBMIT ORDER/JUDG. [ ] SETTLE ORDER/JUDG.

J:\Summary Judgment\Herring. bar 9 deny summary judgment.wpd