Gina v Glo Nightclub
2012 NY Slip Op 30730(U)
March 15, 2012
Supreme Court, Nassau County
Docket Number: 23195/10
Judge: Denise L. Sher
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SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 31
NASSAU COUNTY

JUANA MARISA GINA and JOHN GINA,

Plaintiffs,

Index No.: 23195/10
Motion Seq. No.: 01
Motion Date: 01/18/12

- against -

GLO NIGHTCLUB, MGM PRODUCTIONS, INC., JOHN NOEL SMYTHE, MARIO A. POSILLICO, LUIGI STASI and PSS REALTY ASSOCIATES, LLC,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits and Memorandum of Law	**1**
Affirmation in Opposition and Exhibits	**2**
Affirmation in Reply	**3**

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendants move, pursuant to CPLR § 3212, for an order granting them summary judgment and dismissing plaintiffs' Verified Complaint on the grounds that plaintiffs have failed to identify a defective condition that was the cause of the alleged accident and that plaintiffs have failed to establish actual or constructive notice of an alleged defective condition. Plaintiffs oppose defendants' motion.

This personal injury action arises out of a slip and fall accident that occurred at defendant Glo Nightclub ("Glo") located at 737 Merrick Avenue, Westbury, New York. It is alleged that, on the night of December 4, 2009, at approximately 10:00 p.m., while a patron at

the aforementioned nightclub, plaintiff Juana Marissa Gina was caused to slip and fall on the dance floor of said premises due to liquid on said dance floor. Plaintiffs allege that defendants had actual notice of the alleged condition because, they, through their agents, servants and/or employees knew of the wet, slippery, hazardous condition on the dance floor at the nightclub. Plaintiffs also claim that defendants, through their agents, servants and/or employees, caused and created the condition in mopping said dance floor. Plaintiffs commenced the instant action by filing a Summons and Verified Complaint on or about December 20, 2010. Issue was joined on or about March 1, 2011.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.,* 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427

N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.,* 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the Court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

Defendants submit that they are entitled to summary judgment based upon plaintiff Juana Marissa Gina's inability to identify the cause of her alleged accident. Defendants submit that, at her Examination Before Trial ("EBT"), plaintiff Juana Marissa Gina testified that she went to defendant Glo for her birthday with her daughter and, ultimately, met up with several friends. She further testified that, during said evening, she consumed approximately three margaritas and that she was feeling buzzed. Plaintiff Juana Marissa Gina stated that she remained on the dance floor dancing most of the night. While dancing, she slipped and fell backward. Prior to falling, she did not see anything on the dance floor. After falling, she did not see any liquid or anything on the dance floor. *See* Defendants' Affirmation in Support Exhibit F.

Defendants argue that there is "virtually no evidence in the records to establish that a defect or dangerous condition existed at the time of plaintiff's accident. Moreover, even if the Court inferred that moisture was present on the dance floor, there is no evidence to establish that defendants created the condition and/or had notice of the condition." Defendants contend that summary judgment should be granted due to plaintiff Juana Marissa Gina's failure to identify

the cause of her fall. Defendants submit that plaintiff Juana Marissa Gina's failure to identify the alleged defect that caused the claimed incident is fatal to her case because the trier of fact would be required to base a finding of proximate cause on nothing more than speculation.

In opposition to defendants' motion, plaintiffs submit that their Verified Bill of Particulars alleged that "[p]laintiff JUANA MARIA GINA was caused to slip and fall due to liquid on the dance floor of GLO NIGHTCLUB; She was caused to fall because of a wet, slippery hazardous condition of the area that had just been mopped; She was caused to fall because the Defendants negligently mopped the dance floor without warning the Plaintiff of the wet, slippery and hazardous condition of the area of the dance floor that had just been mopped; She was caused to fall due to Defendants' failure to place cones or signs in the area that had just been mopped; She was caused to fall because of Defendants' failure to cordon off the area which had just been mopped; The Defendants had actual notice because their agents, servants and/or employees caused and created the condition in mopping the dance floor and in failing to warn Plaintiff." *See* Plaintiffs' Affirmation in Opposition Exhibit A.

In support of their opposition, plaintiffs submit the EBT testimony of non-party witness, Patricia Freudenberg. *See* Plaintiffs' Affirmation in Opposition Exhibit E. Ms. Freudenberg testified that, on the evening in question, at one point a drink was spilled on defendant Glo's dance floor and someone employed by defendant Glo came to mop the area. She added that the person who came to mop the dance floor did so in the middle of people dancing. Ms. Freudenberg stated that the mopping of the dance floor took place at around 10:00 that evening and that it was taking place directly behind plaintiff Juana Marissa Gina. At said EBT, Ms. Freudenberg was asked the following question and gave the following answer,

> "Q. Now, you told us at some point after Ms. Gina fell that you did observe an area of the floor that was wet?
> A. I only noticed it after the manager–like when she fell, I didn't even put the two together. She fell right at that spot, like I said. Let's say, you're the gentleman she was talking to and let's say you're her daughter and now she starts walking backwards, and

> then all of a sudden I saw her fall. It wasn't like I didn't know what happened. I saw her fall. She didn't know what happened. It was like a rug pulled from underneath her. And as soon as she- I helped her up and you could see that she was like this, like that And it was like one of those things like whoa, like you didn't have to be a doctor to see. So immediately, we helped her over to a couch and I guess the bouncers notified a manager because the guy was wearing a suit, so I'm assuming he was in the managing position, and he came to ask what happened, and I said she fell and looked in the area where she fell. I said holy comolly, there it is. She fell right there, you know. And then I put it together, oh, they mopped right there. And where the light is beaming and with the lighting, you could see that the floor is wet, and he agreed that he saw it." *See id.*

Plaintiffs also submit the EBT testimony of Robert Smythe in support of their opposition. *See* Plaintiffs' Affirmation in Opposition Exhibit F. Mr. Smythe is employed by defendants as the general manager of defendant Glo. He was working in his capacity as general manager on the night of the subject incident. He testified that neither he, nor any of the defendants, learned about plaintiff Juana Marissa Gina's accident until their receipt of the Summons and Verified Complaint in the within action. Mr. Smythe also stated that the floor porters were responsible for the continuous maintenance of the floor of the nightclub and keeping general public areas clean. He added that, in the event of a spill, a porter would use a dry mop taken from the kitchen. The areas would be cordoned off by a security guard to keep a safe perimeter and that, technically, there would not be any time allowed for the area to dry because of the use of the dry mop. However, the security guards would not necessarily get involved if the spill itself was not brought to their attention. *See id.*

Plaintiffs also submitted an Affidavit from Lisa Marie Gina, plaintiff Juana Marissa Gina's daughter, in support of their opposition. *See* Plaintiffs' Affirmation in Opposition Exhibit G. Lisa Marie Gina states that, on the evening in question, she saw a nightclub employee mop the dance floor in the area where he mother was standing. As her mother was slowly dancing backward into the area that had just been mopped, Lisa Marie Gina saw her

mother's feet slip out from underneath her as if she was standing on a sheet of ice. When Lisa Marie Gina ran to her mother, she saw the wet and greasy area in which her mother was lying. *See id.*

Plaintiffs argue that "cherry-picking the plaintiff's testimony to show that the plaintiff did not know what caused her to fall will not be enough to dismiss the plaintiff's actions if there are other facts and circumstances raising questions of fact as to the dangerous condition, the creation of the condition and causation of the fall....Plaintiff can establish her case with facts and circumstances that permit a logical inference of proximate cause."

In reply to plaintiffs' opposition, defendants argue "[p]laintiff's attempt to establish a defect through Ms. Freudenberg's testimony and a self-serving affidavit from plaintiff's daughter is also insufficient. Ms. Freudenberg did not observe anything on the dance floor until less than five minutes after the plaintiff's fall....Additionally, when she observed the area after plaintiff's fall, there were people in the area where she observed the wetness....She saw moisture from a distance, after time had lapsed, and after other people had the opportunity to traverse the area. Thus, her testimony is purely speculative as to what she allegedly witnessed on the floor as being the defect that caused plaintiff's injury. Again, Mrs. Gina's daughter's affidavit is also lacking information regarding the exact cause of plaintiff's fall. Furthermore, her affidavit contradicts plaintiff's testimony in that plaintiff testified that Patty came to her immediately afterward and her daughter was talking to someone that worked at Glo....Additionally, no one ever identified to plaintiff what caused her to fall....Neither Ms. Freudenberg nor Mrs. Gina's daughter are able to pinpoint the exact cause of her fall, and it is readily apparent plaintiff does not know."

To establish a *prima facie* case of negligence, plaintiff must demonstrate that defendants created the condition which caused the accident or that defendants had actual or constructive notice of the condition. *See Bykofsky v. Waldbaum's Supermarket*, 210 A.D.2d 280, 619 N.Y.S.2d 760 (2d Dept. 1994); *Cusack v. Peter Luger, Inc.*, 77 A.D.3d 785, 909 N.Y.S.2d 532

(2d Dept. 2010). 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. *See Gordon v. American Museum of National History*, 67 N.Y.2d 836, 501 N.Y.S.2d 646 (1986). Plaintiff further must demonstrate that defendants' negligence was a substantial cause of incident. *See Howard v. Poseidon Pools, Inc.* 72 N.Y.2d 972, 534 N.Y.S.2d 360 (1988).

In seeking summary judgment dismissing the Verified Complaint, defendants have the initial burden of establishing that they did not create the alleged dangerous condition and did not have actual or construction notice of it. *See Pelow v. Tri-Main Development,* 303 A.D.2d 940, 757 N.Y.S.2d 653 (4th Dept. 2003).

Based upon the evidence and legal argument presented to the Court in its motion, the Court finds that there are issues of fact as to whether defendants created and had actual or constructive notice of the condition that allegedly caused plaintiff Juana Marisa Gina's slip and fall and resulting injuries; to wit, the alleged wet and greasy condition on the subject dance floor. According to the EBT testimony of non-party witness, Patricia Freudenberg, submitted by plaintiffs in their opposition papers, at once point while she and plaintiff Juana Marisa Gina were at defendant Glo, a drink was spilled on the dance floor and somebody employed by defendant Glo came to mop up the area of the spill. *See* Plaintiffs' Affirmation in Opposition Exhibit E p. 19. Ms. Freudenberg testified that she knew for sure that a drink was spilt (even though she did not see the actually spilling of said drink) because somebody came to mop in the middle of people dancing. *See* Plaintiffs' Affirmation in Opposition Exhibit E p. 20. Ms. Freudenberg added that she pointed out the wet spot on the floor where plaintiff Juana Marisa Gina to a gentleman in a suit whom she believed to be an employee of defendant Glo. *See* Plaintiffs' Affirmation in Opposition Exhibit E p. 26. Ms. Freudenberg further stated that three-quarters of the area in front of the stage (or two to four feet in size) on the dance floor was wet as if someone had knocked a liquid substance off of said stage.

Additionally, according to the Affidavit of Lisa Marie Gina, daughter of plaintiff Juana Marisa Gina, while she and her mother were at defendant Glo, at approximately 10:00 p.m., she "noticed a nightclub employee mop the area where the food had been displayed right in front of the stage area not too far from where my mother and I were standing. Shortly thereafter my mother started dancing away from us, slowly stepping into the area that had just been mopped. As she was slowly dancing backwards at a very nonchalant pace, her feet slipped out from under her as if she was all of a sudden standing on a sheet of ice. She fell backward catching her body weight on her right wrist. I ran to my mother immediately and saw the incredible injury she had suffered to her right wrist and also noticed at the same time the wet and greasy area that she was lying in. This was also the same area that had just been mopped prior to her stepping into the area. The spot where she fell was wet and slick." *See* Plaintiffs' Affirmation in Support Exhibit G ¶ 4-6.

In *Gloria v. MGM Emerald Enterprises, Inc.*, 298 A.D.2d 355, 751 N.Y.S.2d 213 (2d Dept. 2002), the Court affirmed the lower court's finding of summary judgment for defendant in a case where plaintiff slipped on a liquid substance on the dance floor of a restaurant and nightclub owned by defendant and fractured her wrist. However, in the Court's decision it found that there was no proof as to how long the substance had been present on the floor prior to plaintiff's fall, nor were there any findings that defendant had actual notice of the alleged dangerous condition which caused the plaintiff to fall. *See id.* Additionally, the Court stated that the affidavits from two witnesses to the accident also failed to establish that the floor where the plaintiff fell was wet for any period of time prior to the accident. *See id.*

Contrary to the facts in *Gloria v. MGM Emerald Enterprises, Inc.*, *supra*, in the instant matter both non-party witness Patricia Freudenberg and plaintiff Juana Marisa Gina's daughter, Lisa Marie Gina, stated that, right before the subject accident, an employee of defendant Glo had been mopping the subject area and that said area was still wet and greasy after plaintiff Juana Marisa Gina's fall. Said testimony clearly presents issues of fact as to whether defendants

created the condition which caused the subject accident and whether they had actual or construction notice of said condition. *See Brown v. Outback Steakhouse*, 39 A.D.3d 450, 833 N.Y.S.2d 222 (2d Dept. 2007).

The Court further finds that there are indeed questions of fact as to whether defendants negligently mopped the dance floor without warning plaintiff Juana Marisa Gina (or, for that matter, any of the other patrons of the nightclub that evening) of the alleged wet, slippery and hazardous condition of the area of the dance floor that had just been mopped. There has been no evidence submitted that defendants placed cones or signs in the area that had just been mopped or cordoned off said.

The question of whether a condition upon the premises under control of a defendant is sufficiently hazardous to create "liability" is generally a question to be resolved by a jury on the facts particular to the case. *See Argenio v. Metropolitan Transp. Auth.*, 277 A.D.2d 165, 716 N.Y.S.2d 657 (1st Dept. 2000). It is the existence of an issue, not its relative strength that is the critical and controlling consideration in the determination of a summary judgment motion. *See Barrett v. Jacobs*, 255 N.Y. 520 (1931); *Cross v. Cross*, 112 A.D.2d 62, 491 N.Y.S.2d 353 (1st Dept. 1985). The evidence should be construed in a light most favorable to the party moved against. *See Weiss v. Garfield*, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dept. 1964). Summary judgment is seldom appropriate in negligence cases. *See Vandewater v. Sears*, 277 A.D.2d 1056, 716 N.Y.S.2d 495 (4th Dept. 2000); *Connell v. Buitekant*, 17 A.D.2d 944, 234 N.Y.S.2d 336 (1st Dept. 1962).

Accordingly, defendants' motion, pursuant to CPLR § 3212, for an order granting them summary judgment and dismissing plaintiffs' Verified Complaint on the grounds that plaintiffs have failed to identify a defective condition that was the cause of the alleged accident and that plaintiffs have failed to establish actual or constructive notice of an alleged defective condition is hereby **DENIED**.

All parties shall appear for Trial in Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on April 25, 2012 at 9:30 a.m.

This constitutes the Decision and Order of this Court.

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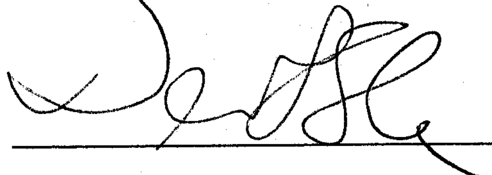

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
March 15, 2012

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