

Sato v Ippudo NY

2012 NY Slip Op 31290(U)

May 7, 2012

Supreme Court, New York County

Docket Number: 113796/2008

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA
Justice

PART 19

Index Number : 113796/2008
SATO, HIDEKI
vs.
IPPUDO NY
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

INDEX NO. _____
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). _____
Answering Affidavits — Exhibits _____ No(s). _____
Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the accompanying memorandum decision.*

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

FILED

MAY 15 2012

NEW YORK COUNTY CLERK'S OFFICE

Dated: 5/7/12

Saliann Scarpulla
SALIANN SCARPULLA
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 : IAS PART 19

-----X
HIDEKI SATO and KADZUKO SATO,

Plaintiffs,

-against-

Index No. 113796/08

IPPUDO NY, PAMELA EQUITIES CORP.
and PAN AM EQUITIES, INC.,

FILED

Defendants.
-----X

MAY 15 2012

SALIANN SCARPULLA, J.:

NEW YORK
COUNTY CLERK'S OFFICE

In this personal injuries action, defendants Ippudo NY, Pamela Equities Corp. and Pan Am Equities, Inc. ("defendants") move, pursuant to CPLR 3212, for summary judgment dismissing the complaint of plaintiffs Hideki Sato ("Sato") and Kadzuko Sato (together "plaintiffs"). In the complaint, Sato alleges that he tripped and fell down a flight of stairs that led to the basement rest room area of Ippudo Restaurant, located at 65 4th Avenue, New York, New York. As a result of the fall, Sato allegedly suffered several fractures, including a neck fracture. It is undisputed that the stairway walls and ceiling are painted black. The stairs have black treads, black nosings, and a black mat at the landing.

Defendants argue that the complaint should be dismissed because the "alleged staircase was not inherently dangerous and any defective condition in the area was not the proximate cause of plaintiff's accident." Defendants further argue that, because they

received no complaints of prior similar incidents, they did not have actual or constructive notice of the alleged dangerous condition.

In support of their motion, defendants submit an affidavit from a licensed professional engineer, John J. Natoli, who opines that the lighting, signs, and hand rails on the stairway are all in compliance with the Building Code. Natoli, however, does not comment at all on the black painted walls, the black ceiling, the black treads on the staircase or the black mat at the end of the staircase.

In opposition to the motion, plaintiffs submit an affidavit from William Marletta Ph.D, CSP (Certified Safety Professional) who alleges that the stairway has improper lighting, an improper first riser height (more than 7-3/4 inches), a sloped or pitched landing, and inadequate signs. Marletta claims that the Ippudo Restaurant floor plan show that the stairway is 46 inches wide, and not 42 inches wide, as measured by Natoli. According to Marletta, a stairway of 44 inches requires a second handrail.

Marletta also claims that he went on an unannounced visit to Ippudo, and that the lighting was changed (lights turned on, or re-pointed to the stairs) prior to his official inspection. Finally, Marletta concludes that the black painted ceiling, walls, treads, and mat show that the stairway was in a dangerous and defective condition.

In addition to submitting the Marletta affidavit, plaintiffs argue that defendants' summary judgment motion should be denied because defendants have recently impleaded the designer of the restaurant. In reply, defendants argue that the staircase was not in

violation of any applicable building codes, because the building pre-dates the Building Code.

Discussion

Owners and lessees have a duty to maintain their property in a reasonably safe condition. *Tagle v Jakob*, 97 N.Y.2d 165, 168 (2001). In addition, "a landowner's duty to warn of a latent, dangerous condition on his property is a natural counterpart to his duty to maintain his property in a reasonably safe condition" *Galindo v. Town of Clarkstown*, 2 N.Y.3d 633, 636 (2004)). Here, defendants fail to show that there are no triable issues of fact with regard to whether they created a defective condition -- a totally camouflaged stairwell. In his affidavit Marletta establishes a factual issue as to whether painting the stairs, ceiling, and walls black created a dangerous and defective condition. A jury may very well find that, in that condition, the totally black stairway created a latent or dangerous condition. That the defendants created this potential trap also creates a duty on their part to assist or warn the plaintiff. *Martino v Stolzman*, 18 N.Y.3d 905 (2012).

Marletta's affidavit also raises a triable issue of fact as to whether or not the stairs complied with pertinent regulations of the Building Code. The defendants fail to address the effect of renovating an older pre-code building's stairway, and whether the renovation must comply with the Building Code. Further, it is true that if a building was constructed in compliance with code specifications and industry standards applicable at the time of construction, the owner is under no legal duty to modify the building thereafter in the wake of changed standards. *Hotaling v City of New York*, 55 A.D.3d 396 (1st Dept

2008), *affd* 12 NY3d 862 (2009). However, defendants have failed to submit any proof to show that the staircase was ever in conformity with the standards applicable at the time the stairway was constructed. *See Lievano v Browning School*, 265 A.D.2d 233 (1st Dept 1999).

Even assuming that the Administrative Code of the City of New York § 27-375 requirements as to the interior finish of interior stair enclosures, riser height, handrails, landing requirements, etc., do not apply because the stairs from where plaintiff fell did not serve as an "exit," but rather as a means of walking from the first floor to the basement, liability may attach as a result of a defective design or construction. A land occupier's duty to entrants on property is a single standard under which liability is to be measured by what is reasonable care under the circumstances. *Quinlan v Cecchini*, 41 N.Y.2d 686 (1977). The Court of Appeals has written that it "would be hard pressed to conclude that a landowner with knowledge of a condition easily alleviated by illumination (such as a curb or a step) is not required to light the area." *Peralta v Henriquez*, 100 N.Y.2d 139, 145 (2003). Here, the black interior stairway walls and ceiling could have been easily alleviated by illumination, and the parties dispute whether the illumination was adequate at the time of Sato's accident.

Because defendants have failed to show entitlement to summary judgment dismissing plaintiffs' complaint as a matter of law, their motion for summary judgment is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
May 7, 2012

ENTER:

Sacchari Scarpulla
J.S.C.
SACCHARI SCARPULLA

FILED

MAY 15 2012

**NEW YORK
COUNTY CLERK'S OFFICE**