

Curatolo v Flynn Waldman & Assoc., Inc.

2013 NY Slip Op 32893(U)

November 12, 2013

Supreme Court, Richmond County

Docket Number: 100458/12

Judge: Joseph J. Maltese

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

**Index No.:100458/12
Motion No.: 002**

KATHLEEN CURATOLO,

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**FLYNN WALDMAN & ASSOCIATES, INC.,
EUGENE F. MCGOUGH and
RUSTY JOAL, INC.**

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
Affirmation in Opposition	2
Affirmation in Reply	3
Exhibits	Attached to Papers

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

The defendants, Eugene F. McGough and Rusty Joal, Inc., move for summary judgment dismissing the plaintiff's complaint. The motion is denied.

Facts

This is an action to recover for personal injuries allegedly sustained as a result of a fall in front of Rusty's Bar on the corner of Forest Avenue and Elizabeth Street on Staten Island, New York. Rusty's Bar is operated by the defendant Rusty Joal, Inc. (hereafter "Rusty's"). The premises was leased to Rusty's by the defendant Eugene McGough. The plaintiff testified that she was injured as she exited Rusty's at approximately 2:15 a.m. on September 13, 2009. Pictures submitted by both the plaintiff and defendants depict the front entrance to Rusty's. The pictures show a concrete slab leading to the front entrance to the bar. However, the height of this slab varies depending upon your

approach to the front door. If you are approaching the front door to Rusty's from Forest Avenue the concrete slab's dimensions are quite small. Plaintiff's expert, Scott Silberman, P.E., gave the following dimensions to the concrete slab as follows:

The landing projects out past the face of the building a distance of 51 inches and is 69 inches wide. However, a person must step down approximately 4 inches from the interior of the building onto this landing. The height of the top surface of this landing in relation to the adjacent sidewalk varies due to the topography of the sidewalk from 1 5/8 inch to 9 3/4 inches. There are no hand rails present.¹

The defendants' expert does not give any dimensions to the concrete slab at issue here. The plaintiff testified that on the date of the accident she had consumed approximately four Michelob Ultra beers at an end of season party at Hillside Swim Club on Staten Island and proceeded to Rusty's at approximately 11:15 p.m. Once in Rusty's she states that she consumed another Michelob Ultra beer before leaving at 2:15 a.m. On the night in question plaintiff testified that she dressed in denim jeans, a blouse and open toed sandals. The affidavit of Tara Herrington, the plaintiff's sister, states that the plaintiff was wearing three to four inch high heels shoes, contrary to the plaintiff's testimony.

The plaintiff testified that while she lived in close proximity to Rusty's she did not frequent the establishment, beyond signing up a her children for local road races. On those occasions, the plaintiff testified that she used a different entrance to Rusty's. On the night of her accident the plaintiff testified that she entered Rusty's from the direction where the concrete slab was approximately 1 5/8 inches high. Upon leaving the establishment the plaintiff testified that the her initial route of ingress was blocked by two patrons engaging in conversation. Therefore she sought to exit Rusty's at the opposite side of the concrete slab which measures approximately 9 3/4 inches. Plaintiff testified that she was unfamiliar with the height differential and did not anticipate a steep drop. On the night in question the plaintiff testified that the light was not on in

¹ Aff of Scott M. Silberman at 2-3.

front of Rusty's and that there was no handrail located on the steep side of the concrete slab. The defendants testified that a 75 watt light bulb was functioning on the date of the accident. Irrespective of whether the light was on or off, as the plaintiff stepped off the concrete slab her foot landed awkwardly and she testified that she felt bones break. Moreover, plaintiff testified that her ankle swelled immediately. After presenting to Richmond University Hospital, the plaintiff was diagnosed with a spiral fracture to her right ankle and ligament damage. She underwent open reduction internal fixation to repair the fractured ankle and ligament damage. As a result of the fracture the plaintiff missed nearly 19 weeks of work as a registered nurse.

The defendants now move to dismiss the plaintiff's complaint arguing that the concrete slab was free from any defect and the concrete slab was open and obvious.

Discussion

A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion".² Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.³ As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.⁴ On a motion for summary

² *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2d Dept 1990].

³ *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].

⁴ *Rotuba Extruders v. Ceppos.*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003].

judgment, the function of the court is issue finding, and not issue determination.⁵ In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.⁶

A landowner has no duty to warn of conditions that are not inherently dangerous and “that are readily observable by the reasonable use of one's senses.”⁷ The defendants argue that they are entitled to summary judgment as a matter of law because: 1) the plaintiff was aware of the step having frequented Rusty’s on prior occasions;⁸ 2) the plaintiff was aware of the existence of the step;⁹ 3) plaintiff did not trip on any foreign substance or object on the step;¹⁰ and 4) there was no defect in the lighting or any other “optical illusion” concealing the step.¹¹

However, the facts do not support the defendants contentions. First, the testimony of the plaintiff indicates that she did not frequent Rusty’s regularly, and that when she did enter the establishment it was from a different location. Moreover, photographic evidence submitted in connection with this motion indicates that this step varied in height depending on a patron’s approach to the establishment and while the plaintiff was aware that a slight step existed on her way into Rusty’s there is no evidence to demonstrate a prima facie entitlement to judgment as a matter of law, that she was aware of the height differential when exiting on the steeper side of the concrete slab. Finally, there is a question as to whether the 75 watt lightbulb was functioning on

⁵ *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff’d* 65 NY2d 732 [1985].

⁶ *Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989].

⁷ *Pirie v Krasinski*, 18 AD3d 848 [2d Dept 2005].

⁸ *See, Luciano v. 144-18 Rockaway Realty Corp.*, 32 AD3d 505 [2d Dept. 2006].

⁹ *Id.*

¹⁰ *See, Broodie v. Gibco Enterprises, Ltd.*, 67 AD3d 418 [1st Dept. 2009].

¹¹ *See, Murray v. Dockside 500 Marina, Inc.*, 32 AD3d 832 [2d Dept. 2006].

the date and time of the plaintiff's accident. Such an evaluation is one of fact and not of law. As the plaintiff correctly directs the court, the "determination of whether a condition is inherently dangerous depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury."¹² Therefore, the moving defendants failed to meet their prima facie burden on this motion for summary judgment.

Accordingly, it is hereby:

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

ORDERED, that this action is hereby transferred to **JCP 8, 18 Richmond Terrace, on Monday, December 16, 2013 at 9:30 a.m.**; and it is further

ORDERED, that the parties must supply a list of HIPAA compliant authorizations that will be needed for trial to opposing counsel at the time the case first appears on the JCP 8 calendar. Thereafter, HIPAA authorizations are to be served within sixty (60) days.

ENTER,

DATED: November 12, 2013

Joseph J. Maltese
Justice of the Supreme Court

¹² *Hayes v. Texas Roadhouse Holdings, LLC.*, 100 AD3d 1532 [4th Dept. 2012].