Tassini v L & I Lounge, LLC
2014 NY Slip Op 30516(U)
February 28, 2014
Supreme Court, New York County
Docket Number: 101548/2011
Judge: Shlomo S. Hagler
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SCANNED ON 3/6/2014

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Shlomo S. Hagler
Justice

PART: 17

FABIANNA TASSINI,

Plaintiff,

- against -

L & I LOUNGE, LLC d/b/a TILLMAN'S RESTAURANT,

Defendant.

INDEX NO.: 101548/2011

MOTION SEQ. NO.: 002

DECISION and ORDER

Motion by defendant for summary judgment to dismiss plaintiff's complaint.

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Cross-Motion: ❑ No ☑ Yes **Number of Cross-Motions:** 1

Cross-Motion by plaintiff for summary judgment on liability.

FILED
MAR 06 2014
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is hereby ordered that the Motion by defendant L & I LOUNGE, LLC d/b/a TILLMAN'S RESTAURANT for summary judgment and the Cross-Motion of plaintiff Fabianna Tassini for summary judgment are both denied as set forth in the attached separate written Decision and Order.

Dated: February 28, 2014
New York, New York

Hon. Shlomo S. Hagler, J.S.C.

Check one: ❑ **Final Disposition** ☑ **Non-Final Disposition**

Motion is: ❑ Granted ☑ Denied ❑ Granted in Part ❑ Other

Cross -Motion is: ❑ Granted ☑ Denied ❑ Granted in Part ❑ Other

Check if Appropriate: ❑ SETTLE ORDER ❑ SUBMIT ORDER

❑ DO NOT POST ❑ REFERENCE

[* 2]

FILED

MAR 06 2014

COUNTY CLERK'S OFFICE
NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

--X

FABIANNA TASSINI,

Plaintiff,

-against-

L & I LOUNGE, LLC d/b/a TILLMAN'S RESTAURANT,

Defendant.

--X

Index No. 101548/2011

Motion Sequence No. 002

DECISION & ORDER

HON. SHLOMO S. HAGLER, J.S.C.:

Defendant L&I Lounge LLC d/b/a Tillman's Restaurant ("defendant" or "restaurant") moves for an order pursuant to CLPR § 3212 granting defendant summary judgment dismissing the complaint. Plaintiff Fabianna Tassini ("plaintiff" or "Tassini") opposes the motion and cross-moves for summary judgment. Both the motion and the cross-motion are consolidated herein for disposition.

FACTUAL BACKGROUND

This is an action for personal injuries that plaintiff allegedly sustained in a slip-and-fall on the stairs of the defendant's restaurant, located at 165 West 26th Street, New York, New York 10001. Plaintiff alleges that on May 4, 2010, at approximately 10:00 p.m., she stepped on a slippery substance while descending the stairs in defendant's restaurant, causing her to fall down the stairs and sustain injuries (Tassini EBT, at pp. 18-19; Tassini Affidavit in Opposition to Defendant's Motion and in Support of Plaintiff's Cross-Motion, sworn to on January 14, 2013 ["Tassini Aff."], at ¶¶ 4, 5, and 9.) Plaintiff asserts that when she started descending the steps which lead from the dining area to the restrooms and kitchen in the basement, she slipped on the first step down but caught her balance and did not fall (Tassini EBT, at pp. 33-35; Tassini Aff., at ¶¶ 4 and 5). After the initial slip, plaintiff looked at the first step and noticed a two-inch wide spot of wetness on the

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first step (Tassini EBT, at p. 37). Plaintiff then proceeded down the stairs, but she slipped again on the next step and fell to the bottom of the stairwell (Tassini EBT, at p. 34; Tassini Aff., at ¶ 5). Plaintiff claims not to have seen what it was that she slipped on, but maintains that she felt something wet through the bottom of her shoe (Tassini EBT, at pp. 36, 37; Tassini Aff., at ¶¶ 4, 5).

Plaintiff contends that a member of defendant's staff must have caused or created the alleged dangerous condition because the stairway is the only means by which food and drink is brought to and from the kitchen in the basement to the dining area upstairs. Plaintiff also claims that since there was no set schedule for inspecting the steps, defendant was on constructive notice.[1] While plaintiff surmises that defendant's employees must have caused the slippery condition, plaintiff has not provided any proof or evidence that defendant's employees caused the alleged dangerous condition on the steps or for how long the alleged condition existed.

Lesly Bernard ("Bernard"), the manager of the restaurant, testified that he visually inspects the stairs several times a day (Bernard EBT, attached as Exhibit "K" to Defendant's Motion, at p. 16), and that the restaurant has a general policy to maintain cleanliness (*id.*, at p. 27). However, Bernard did not indicate how often or when the stairs were inspected or cleaned on the day of the accident and conceded that he was only in the restaurant office earlier that day and was not there during the evening when the plaintiff slipped and fell (*id.*, at p. 16). He also testified that while he has in the past noticed foreign substances on the stairs (*id.*, at p. 20), and while he has never personally observed a waiter or busboy spill anything on the steps he does know that they do spill things and that it is possible for liquids to spill onto the steps when food goes from the kitchen to

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1. Plaintiff does not allege that defendant had actual notice of the condition.

the restaurant (*id.*, at p. 21). Bernard also testified that restaurant patrons and guests bring beverages with them when they go up and down the stairs (*id.*, at p. 22).

Summary Judgment

The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*see Zuckerman v City of New York*, 49 NY2d 557, 562; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Matter of Redemption Church of Christ v Williams*, 84 AD2d 648, 649; *Greenberg v Manlon Realty*, 43 AD2d 968, 969)" (*id.*). Once such proof has been offered, in order to defend the summary judgment motion, the opposing party must "show facts sufficient to require a trial of any issue of fact" (CLPR §3212[b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]; *Freedman v Chemical Constr. Corp.*, 43 NY2d 260 [1977]; *Spearmon v Times Square Stores Corp.*, 96 AD2d 552 [2d Dept 1983]). "It is incumbent upon a [party] who opposes a notion for summary judgment to assemble, lay bare and reveal his proof, in order to show that the matters set up in his [complaint] are real and are capable of being established upon a trial" (*Spearmon*, 96 AD2d at 553, quoting *Di Sabato v Soffes*, 9 AD2d 297, 301 [1st Dept 1959]). If the opposing party fails to submit evidentiary facts to controvert the facts set forth in the movant's papers, the movant's facts may be deemed admitted and summary judgment granted since no triable issue of facts exists (*Kuehne & Nagel, Inc. v F.W. Baiden*, 36 NY2d 539 [1975]).

Duty of Care

It is well settled that a landowner and/or possessor of land has a duty to exercise reasonable care to keep its premises in a safe condition (*Basso v Miller*, 40 NY2d 233 [1976]; *Demas v E&R Quilting Corp.*, 111 AD2d 898 [2d Dept 1985]). For the landowner and/or possessors to be held liable for a dangerous condition on its premises, the injured party must prove that the landowner and/or possessor created the alleged dangerous condition, or had actual or constructive notice of the condition (*Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). To constitute constructive notice "a defect [or dangerous condition] must be visible and apparent and it must exist for a sufficient time prior to the accident to permit defendant's [landowner's and/or possessor's] employees to discover and remedy it." (*Id.* at 837.)

Issue

The issue to be determined herein is whether defendant either created or had constructive notice of the alleged dangerous condition of the steps in defendant's restaurant where plaintiff allegedly slipped and fell.

Arguments

Defendant argues that it is entitled to summary judgment because "plaintiff cannot establish the cause of her accident. In addition, assuming arguendo that plaintiff can establish what caused her accident, plaintiff cannot establish that Tillman's had actual or constructive notice of the transitory wet condition alleged, and cannot establish that Tillman's created the subject condition in this slip and fall claim." (Affirmation of Defendant's Counsel John O Fronce ["Fronce"] in Support of Defendant's Motion ["Fronce Aff. in Support of Motion"], at ¶ 3.)

Plaintiff alleges that because the wait staff uses the staircase to bring food and drinks up from the kitchen located on the lower level, it must have been a member of the wait staff that created the

slippery condition that caused her alleged fall. Defendant denies both of these claims. Additionally, plaintiff argues that because the defendant admits that the waiters and busboys occasionally spill things and that spills of liquid onto the stairs can occur when food goes from the kitchen in the basement to the restaurant area above, and because the defendant did not maintain a regular schedule to inspect and/or clean the steps, defendant is thereby on constructive notice of any dangerous condition that occurs on those steps.

DISCUSSION

Defendant argues it is entitled to summary judgment because plaintiff has not proved its *prima facie* case. Defendant argues that plaintiff has failed to identify what, if anything, caused her slip and fall, and failed to show that the defendant caused or created the alleged slippery condition on the stairs where she fell, or that the defendant had actual or constructive notice of the condition. The Appellate Division in the First Department, however, holds that a defendant cannot obtain summary judgment by pointing to gaps in plaintiff's proof but is required to tender evidence that it was not negligent (*Bryan v 250 Church Associates, LLC*, 60 AD3d 578 (1st Dept 2009) (citations omitted).

Defendant cites *Wellington v. Manmall, LLC*, 70 AD3d 401 (1st Dept 2010), *Frank v Time Equities, Inc.*, 292 AD2d 186 (1st Dept 2002), and *Strowman v Great Atl. and Pac. Tea Co.*, for the proposition that a defendant moving for summary judgment need not submit evidence establishing a lack of notice where the plaintiff failed to claim the existence of notice of the dangerous condition. However, these cases are inapplicable here because plaintiff has raised the issue of constructive notice in this action.

Plaintiff argues that she identified the cause of the trip and fall as the wet spot that she saw on the first step after she slipped and that she felt wetness on the bottom of her shoe after she fell

from the second step. Plaintiff also argues that defendant either caused or created the slippery condition on the stairs and/or had constructive notice of the condition since it was aware that the staff would spill things and that liquids would spill when brought to and from the kitchen.

With regards to whether the defendant caused or created the alleged dangerous condition, plaintiff testified that she does not know how it was created but argues that the wet condition must have been caused by a restaurant employee since the stairway was the only means by which food and drink came to and from the kitchen. In order to make that inference, the incident needs to have occurred in a "center of activity" of the defendant's premises that was an area not frequented by patrons. A "center of activity" is an area in which the activity of the defendant is so extensive that is more likely that an employee of the defendant, rather than a patron, created the dangerous condition, therefore allowing a logical inference of liability. In *Castore v Tutto Bene Rest. Inc.* (77 AD3d 599 [1st Dept 2010]), the court held that plaintiff's conjecture that restaurant employees might have spilled some water or other liquid on the stairs where plaintiff slipped and fell when food was transported from the basement upstairs to the first floor where the dining room was located, was speculation and not a substitute for evidentiary proof in admissible form required to establish the existence of a triable question of material fact. (*See also Costanzo v Woman's Christian Assn. of Jamestown*,92 AD3d 1256, 1257 [4th Dept 2012] [evidence that stairway where plaintiff slipped and fell on allegedly clear liquid is used by both hospital employees and the public alike, any conclusion that an employee of the hospital, as opposed to a member of the general public, spilled the liquid at issue would be mere speculation].)

On the other hand, in *Mele v GMRI, Inc.* (41 AD3d 123 [1st Dept 2007]), the First Department reversed the motion court which granted summary judgment to the defendant restaurant. The appellate court found that the defendant restaurant failed to establish that there was no triable

issue on its summary judgment motion as to whether it created the alleged hazard when the plaintiff slipped twice while being led to her table through part of defendant's restaurant close to a service bar equipped with an ice machine and soda dispenser and near a sink and coffee maker, the plaintiff and her husband described the floor where plaintiff slipped as "wet" and "shiny" and evidence showed that the area was heavily trafficked by tray-carrying employees moving between the kitchen, the beverage dispensing area and the dining area. Although the plaintiff could not testify as to how long the wet substance had been on the floor, the circumstances permitted the inference that the defendant's employees created the wet condition that caused plaintiff's accident.

Similarly, in *Kesselman v Lever House Rest.* (29 AD3d 302, 303 [1st Dept 2006]), the plaintiff a restaurant patron, slipped and fell on a wet substance in a hallway leading from the dining area to the restrooms. The hallway was also heavily utilized by waiters and other restaurant employees carrying food from the kitchen to the dining room and waiter stations, as well as water and beverage service, was located in that hallway. The restaurant manager also testified that since the hallway was heavily traveled, food and drinks might fall onto the hallway floor. While runners were placed on the hallway's terrazzo floor[2] for "added safety" to create a secure path, they did not cover the entire width of the hallway and had gaps between them. Plaintiff slipped and fell as she altered her path along the hallway to the restroom as a result of waiters using one of the stations and the hallway was filled with approximately twenty (20) people, many of whom were moving in the opposite direction. The plaintiff testified that after she fell, she noticed that the bottom and seat of her pants were wet and that it was more than mere dampness. Plaintiff was not able to state how long the wet, slippery substance had been present. Defendant moved for summary judgment,

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2. Terrazzo is a material that becomes very slippery when wet.

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claiming the record did not establish that it either created or had actual or constructive notice of the injury causing condition. Plaintiff opposed the motion, arguing that the evidence permitted an inference to be reasonably drawn that defendant's employees created the wet condition which caused plaintiff's fall, thus creating a triable issue of fact precluding the granting of summary judgment. The IAS court found that the plaintiff failed to raise an issue of fact regarding whether defendant created, or had actual or constructive notice, of the condition that caused plaintiff to fall and granted defendants motion for summary judgment and dismissed the complaint. The appellate court reversed the IAS court's granting of summary judgment to the defendant restaurant, stating that "summary judgment is not warranted simply because a plaintiff is unable to identify what debris was on the floor, how long it was there, and the manner in which it came to be on the floor" (citing *Colt v Great Atl. & Pac. Tea Co.*, 209 AD2d 294 [1st Dept 1994]). (*See also Mattias v Rebecca's Bakery Corp.*, 44 AD3d 429 [1st Dept 2007] [defendant denied summary judgment when plaintiff slipped and fell in kitchen area not frequented by patrons; defendants did not adduce sufficient evidence to remove any issue of fact that defendant neither created nor had actual or constructive notice of the hazard, and did not indicate when they last inspected the floor before the accident; thus trier of fact could draw inference that defendant's employees created the condition which caused plaintiff's slip and fall]).

In the present case, it is a question of fact whether the area where plaintiff slipped and fell is considered a "center of activity." On the one hand, the kitchen is located in the basement and the restaurant employees are constantly bringing food and beverages up from there to the dining room using the stairs. Furthermore, the restaurant's manager, Bernard, admitted that the defendant's employees occasionally spill food and liquids when bringing food from the kitchen up the stairs to the dining area (Bernard ET, at p. 21). The restaurant's bathrooms are also located on the lower

level so both patrons and restaurant staff frequent those steps. In addition, Bernard testified that patrons often bring drinks with them to the bathroom (Bernard EBT, at p. 22) and the alleged slippery or wet condition could have resulted from a patron spilling his or her drink. Finally defendant failed to indicated how often or when the steps were inspected or cleaned.

As such, it is a question of fact whether the defendant's employees or a patron of the restaurant may have created the slippery condition.

With regards to the issue of notice, since actual notice is not alleged here, the only question is whether defendant had constructive notice. As referenced above, the standard as laid out in *Gordon* is very clear on this point. Constructive notice is demonstrated when the dangerous condition is "visible and apparent," and in place for a period of time such that the landowner and/or possessor could discover and remedy it.

Plaintiff contends that we need not look to the aforementioned factors as defendant did not show when the last time the stairs were inspected for a dangerous condition or were cleaned. While defendant's manager's deposition testimony stated that he visually inspected the stairs several times daily, he also testified that he was only at the restaurant on the day of the accident earlier in the day. He did not indicate, either in his deposition testimony or in an affidavit, when or how often the stairs were inspected or cleaned near the time of plaintiff's fall.

The First Department stated in *Cater v Double Down Realty Corp.* that:

> Defendants failed to establish their entitlement to judgment as a matter of law, in this action where plaintiff slipped and fell as she descended the interior steps of defendants' building. The evidence submitted by the defendants was insufficient to show that they lacked constructive notice of the alleged wet condition of the stairs. Defendants failed to offer specific evidence as to their activities on the day of the accident, including evidence indicating the last time the staircase was inspected, cleaned, or maintained before plaintiff's fall.

Similarly, in *Guerrero v Duane Reade, Inc.*, 112 AD3d 496 (1st Dept 2013), the Appellate Division held that:

> In this slip and fall action, defendant failed to establish as a matter of law that it did not create or have actual or constructive notice of a hazardous condition, since it failed to offer specific evidence as to its activities on the day of the accident, including , but not limited to, when the area where the plaintiff fell was last inspected.

Since defendant in the instant action has failed to provide any specific evidence of when the stairs where plaintiff fell were inspected, cleaned or maintained on the date of plaintiff's fall, summary judgment must be denied on defendant's motion.

Recurrent Condition

It is well settled that "when a landowner [and/or possessor] has actual knowledge of the tendency of a particular condition to reoccur, he is charged with constructive notice of each specific reoccurrence of that condition" (*Weisenthal v Pickman*, 153 AD2d 849, 851 [2d Dept 1989] [emphasis added]). In addition, plaintiff can establish constructive notice "by evidence that an ongoing and recurring dangerous condition existed in the area of the accident which was routinely left unaddressed by the landlord [and/or possessor]" (*O'Connor-Miele v Barbite & Holtzinger, Inc.*, 234 AD2d 106, 107 [1st Dept 1996]). However, a "general awareness" of a dangerous condition is insufficient to constitute notice of the particular condition that caused the plaintiff's fall. (*See Piacguadio v Lecine Realty Corp.*, 84 NY2d 967 [1994]; *Mercer v City of New York*, 223 AD2d 688 [2d Dept 1996] *affd* 88 NY2d 955 [1996].)

In this case, Bernard, the manager of the restaurant, testified that he occasionally saw foreign substances on the steps (Bernard EBT, at p. 20), that he was aware that waiters and busboys occasionally spilled food and liquids and that it was possible that foods and liquids spilled onto the stairs (*id.*, at 21). While Bernard testified that the restaurant had policies regarding maintaining

cleanliness (*id.*, at p. 27), defendant has failed to indicate what those policies were or how often they were implemented. Thus, there is a question of fact as to whether spilled food or liquids on the stairs were a recurrent condition and whether defendant took reasonable action to prevent such a recurring condition.

Plaintiff's Cross-Motion for Summary Judgment

Plaintiff cross-motion argues that she be granted summary judgment because the defendant created the dangerous condition (*i.e.*, the wet or slippery step) or had constructive notice of the condition. However, plaintiff has failed to provide any proof to support these arguments. As noted in the discussion regarding defendant's motion, at best there are questions of fact regarding whether defendant caused or created the alleged wet or slippery condition or had constructive notice of the condition. Therefore, plaintiff's cross-motion for summary judgment is also denied.

CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion for summary judgment by defendant L & I Lounge, LLC d/b/a Tillman's Restaurant dismissing the complaint is denied, and it is further

ORDERED that the cross-motion by plaintiff Fabianna Tassini for summary judgment is also denied

The foregoing constitutes the decision and order of this Court.

FILED

MAR 06 2014

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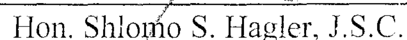

Dated: February 28, 2014
New York, New York

Hon. Shlomo S. Hagler, J.S.C.