Moyse v Gruber
2014 NY Slip Op 30683(U)
March 12, 2014
Supreme Court, Suffolk County
Docket Number: 11-17028
Judge: Joseph C. Pastoressa
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[* 1]

SHORT FORM ORDER

INDEX No. 11-17028
CAL. No. 13-00741OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. # 002 - MG

DIANE MOYSE, Plaintiff, - against - MAURICE D. GRUBER, IRA I. MILLER, BOWL LONG ISLAND LLC, d/b/a BOWL LONG ISLAND AT PATCHOGUE, Defendants.	JOHN RAY & ASSOCIATES Attorney for Plaintiff 122 North Country Road, P.O. Box 5440 Miller Place, New York 11764-1117 GORDON & SILBER, P.C. Attorney for Defendant Bowl Long Island 355 Lexington Avenue New York, New York 10017-6603

Upon the following papers numbered 1 to 9 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 5 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 6 - 7; Replying Affidavits and supporting papers 8 - 9 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Bowl Long Island LLC d/b/a Bowl Long Island at Patchogue for summary judgment (CPLR 3212) is granted and the complaint insofar as asserted against it is dismissed.

Plaintiff commenced this action seeking to recover damages for personal injuries she sustained on March 21, 2011, when she fell while exiting the bowling alley located in the building known as 138 West Avenue in Patchogue, New York. Moving defendant Bowl Long Island LLC d/b/a Bowl Long Island ("Bowl Long Island" or the "LLC") occupies the building as a tenant pursuant to a lease for the purposes of operating a bowling alley.

In her complaint as amplified by her bill of particulars, plaintiff alleges that "the nature of the dangerous or defective condition is a platform leading to the front entrance of the building and the front door that opened outward onto the platform from the inside of the bowling alley." Plaintiff also alleges that Bowl Long Island "negligently constructed, maintained, renovated and/or designed the premises, in

that the amount of space left on the platform between the edge of the entrance door, when open, and the first step leading down from the platform to the sidewalk was extremely narrow–shorter than an average human foot–and thus unsafe, dangerous and a hazardous condition." She further alleges that Bowl Long Island was negligent in failing to install a handrail, in removing a door stop and/or barrier that held the door open during business hours, and in failing to warn about the proximity of the outward-opening doors to the edge of the platform.

Issue has been joined, discovery completed and the note of issue filed. Defendant Bowl Long Island now moves for summary judgment dismissing the complaint, arguing that it was not negligent in its operation, maintenance, management, repair or control of the premises on or before the date of the accident; that there was no dangerous or defective condition in the area where plaintiff fell, and if there was such a condition, it did not create or have prior notice of the condition; and that the location of plaintiff's accident complied with all building code provisions.

In support of its motion, Bowl Long Island submits, among other things, the deposition testimony of the plaintiff, Daniel Robertson, Christopher Keller, and Joseph Perino, a compact disc containing digital surveillance footage of the plaintiff's accident, the affidavits of Robert Eggert and Scott Derector, P.E., and color photographs. Plaintiff testified that she and her boyfriend Daniel Robertson ("Robertson") went to Bowl Long Island to bowl with her son and grandchildren, and that she had never been to the building prior to the day of her accident. It was a cold, sunny clear day. She, with Robertson carrying their bowling balls, entered the building by walking up two steps and opened the door without incident; there were no handrails. After bowling, she proceeded to leave, walking in front of Robertson who was again carrying their bowling balls, intending to hold open the door for him. Plaintiff testified that she pushed the door fully open which put her at the edge of the step, turned to step down, and the next thing she knew, she was laying on the ground in pain. She did not report the accident to anyone in the bowling alley or complete any type of accident report.

Robertson testified that he did not see the plaintiff fall as he was already through the door and down the steps with his back to her. Robertson testified that he returned to Bowl Long Island the next day and took pictures of the entrance and steps where the accident occurred. During his deposition he was shown the color photographs he had taken and testified that they were an accurate depiction of how the location appeared on the day of the plaintiff's accident.

Christopher Keller was deposed on behalf of Bowl Long Island, testifying that he and Robert Eggert are partners, each holding a 50% interest in the LLC. Keller testified that the bowling alley had been in business for approximately 50 years before he purchased it in 2008. He explained that there are two entrances for the public's use, the north entrance which is in the front of the building, and the south entrance in the back of the building which has steps and a ramp. The doors for both entrances are identical, with double doors which open outward. Keller testified that no changes have been made to either entrance since the LLC became the owners, and specifically testified that no changes were made to the north entrance steps or configuration of the doors. He also testified that he never received any complaints from anyone about the distance between the door and the edge of the step, and was unaware of any prior accidents that had occurred in the area of the plaintiff's accident.

Joseph Perino testified that he has worked in the building for approximately 27 years, and is currently and has been the head mechanic and facility manager since 1989. He also testified that no changes have been made to the entrance steps or doors since the LLC purchased the building, and that the building had been renovated between 1992 and 1994 to become handicap compliant. Additionally, he testified that he was unaware of any accidents which had occurred in the area where the plaintiff fell.

In his affidavit, Robert Eggert asserts that he is an owner of the LLC, and that part of his job duties include operating, maintaining and viewing the surveillance system located within the bowling alley. Eggert explains that if an accident occurs on the premises, it is his job to review and save the video footage of the accident on the computer's hard server. He asserts that following the plaintiff's accident on March 27, 2011, he reviewed and saved the footage, and when the attorneys for the LLC requested the footage, he placed it on a disc and forwarded it to the attorneys. Eggert also asserts in his affidavit that there is a high volume of foot traffic through the north entrance. He states that he has never received a complaint about the north entrance and, other than plaintiff's accident is not aware of any accidents that have occurred thereat.

Scott Derector, P.E., asserts in his affidavit that he is a licensed Professional Engineer with seventeen years of experience; his curriculum vitae is annexed to the moving papers. Derector asserts that on April 12, 2012 he personally inspected the accident site, reviewed the photographs of the area and the surveillance footage of the accident. Derector states that the property card he obtained from the Village of Patchogue reveals that the building was constructed in 1950, at a time when New York State did not have a uniform building code. He also states that his review of the surveillance footage revealed that approximately two minutes before the plaintiff's accident, ten people, including one in a wheelchair, exited the building without incident, and seventeen seconds after the plaintiff's accident, a female exited without incident.

During his inspection, Derector determined that the north entranceway has two risers with one step up to a landing. The double set of doors open outward and terminate 11-1/2 inches from the edge of the landing when in the open position. Derector opines that in his opinion and based upon his research of the current 2010 Building Code of New York State, the Property Maintenance Code of New York State, the Fire Code of New York State or any known code applicable in the State of New York, County of Suffolk, Town of Brookhaven or Village of Patchogue, there is no requirement (i) for the north entrance to be equipped with a handrail, (ii) for the entrance door to be propped open with a door stop, (iii) for the steps to be marked with any type of warning or (iv) which indicates that the 11-1/2 inch space between the edge of the door in the open position and end of the landing is insufficient. Derector opines, upon a reasonable degree of engineering certainty, that the subject entranceway was code compliant, properly maintained as constructed, and safe for its intended use.

The surveillance footage proffered by Bowl Long Island clearly shows that immediately prior to the plaintiff's accident, several people walked through the door without incident, including a female pushing open and holding the door for a group of people. The surveillance footage also shows the plaintiff pushing open the door with her back to the steps and attempting to step down backwards, when she lost her footing and fell.

Based on the evidence submitted, Bowl Long Island has established its prima facie entitlement to judgment as a matter of law by demonstrating that there was no defective condition on the stairs which could have caused her to fall (see Jung v Kum Gang, Inc., 22AD3d 441 [2d Dept 2005]; Hyman v Queens County Bancorp, Inc., 307 AD2d 984 [2d Dept 2003], *affd* 3 NY3d 743 [2004]). In opposition, the plaintiff failed to raise a triable issue of fact.

Plaintiff argues that the expert affidavit submitted by Bowl Long Island must not be considered because it was notarized in New Jersey and not accompanied by a certificate of conformity pursuant to CPLR 2309[c]. Such a defect is not fatal to consideration of the affidavit on a motion for summary judgment (see Gonzalez v Perkan Concrete Corp., 110 AD3d 995 [2d Dept 2013]; Fredette v Southampton, 95 AD3d 940 [2d Dept 2012]).

With respect to the allegations in plaintiff's verified complaint that the space between the open door and the edge of the stairs was less than one foot and extremely narrow, thereby creating an unsafe condition, plaintiff offers no proof of a building code violation or deviation from any specific architectural standards (see McKee v State, 75 AD3d 893, 894 [3d Dept 2010]) ["Without proof of code violations or deviation from standards accepted by the industry, claimant failed to establish that the door sill was defectively designed"]; see also Cusumano v City of New York, 15 NY3d 319 [2010]). Similarly, as to the lack of a handrail, plaintiff fails to cite to any building code or other regulation that Bowl Long Island purportedly violated by failing to have one installed (see Jung v Kum Gang, Inc., 22 AD3d 441, 442-443 [2d Dept 2005], lv denied 7 NY3d 704 [2006], citing 86 NY Jur2d Premises Liability § 445 ["unless a stairway in public premises comes within the purview of a statute requiring that handrails be provided, the owner may not be held liable for maintaining a dangerous stairway because of the absence of a handrail where the steps are in no way defective"]; see also Hyman v Queens County Bancorp, Inc., supra).

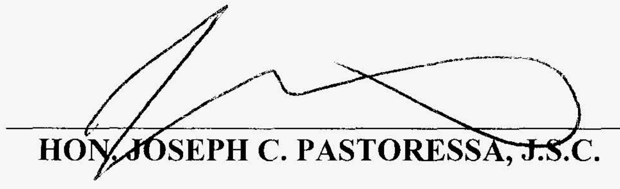
Notwithstanding plaintiff's failure to establish a design defect or cite to a building code violation attributable to the doors or steps, the defendants could be liable for common-law negligence due to a failure to remedy or warn of a dangerous or defective condition (see Martinez v City of New York, 73 AD3d 993 [2d Dept 2010]; McKee v State, supra). However, no liability will be found absent proof that a defendant actually created the dangerous condition or, alternatively, had actual or constructive notice thereof (Piacquadio v Recine Realty Corp., 84 NY2d 967 [1994]; Teplin v Bonwit Inn, 64 AD3d 642 [2d Dept 2009]). Here, there is no evidence Bowl Long Island created any dangerous or defective condition, by installing the subject door "extremely close" to the edge of the landing. The unrefuted deposition testimony establishes that no renovations or changes were made to the subject doors since Bowl Long Island took possession. Nor is there any evidence that Bowl Long Island had notice that this condition was dangerous or defective, as the unrebutted testimony established that there had been no prior accidents or complaints regarding the doors or the subject steps. Moreover, assuming *arguendo* that Bowl Long Island was generally aware of an unsafe condition, it would still be insufficient to establish constructive notice (see Gordon v American Museum of Natural History, 67 NY2d 836 [1986]).

Plaintiff's claims that Bowl Long Island had a duty to prop the door open during business hours, that a warning should have been posted, or other safety feature installed, are based on sheer speculation and conjecture, unsupported by an expert's affidavit or any legal authority. Thus, these claims are

baseless and insufficient to overcome Bowl Long Island's prima facie showing. Any remaining arguments by the plaintiff not explicitly addressed herein have been reviewed and deemed to be without merit.

Although unfortunate, the mere happening of the subject accident does not give rise to liability (see Killeen v State of New York, 66 NY2d 850 [1985]; Wells v Finnegan, 177 AD2d 893 [3d Dept 1991]). Accordingly, the moving defendant, Bowl Long Island LLC d/b/a Bowl Long Island at Patchogue, is entitled to summary judgment dismissing the complaint.

Dated: March 12, 2014



HON. JOSEPH C. PASTORESSA, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION