

Ambrose v Hughes Bar & Rest.

2014 NY Slip Op 32963(U)

October 28, 2014

Supreme Court, New York County

Docket Number: 150765/13

Judge: Joan A. Madden

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

----- X
EILEEN AMBROSE and JOHN AMBROSE,

Plaintiffs,

-against-

Index No. 150765/13

HUGHES BAR AND RESTAURANT,

Defendant.

----- X
JOAN A. MADDEN, J.:

In this personal injury action, defendant Hughes Bar and Grill moves for summary judgment dismissing the complaint against it. Plaintiffs oppose the motion, which is denied for the reasons below.

Background

Plaintiff Eileen Ambrose (“Ambrose”) alleges that she sustained personal injuries on October 7, 2012, at a bar owned and operated by defendant, located at First Avenue, New York, New York (hereinafter “Hughes”). The accident occurred when Ambrose went to the employees-only side of a bar in attempt to give the bartender a “high-five,” and, upon crossing behind the bar, fell down the stairs to a storage cellar. At the time of the accident, the trap door to the cellar was open.

At her deposition, Ambrose testified that on the date of the accident, she went Hughes for a benefit being held for a friend. Ambrose dep. at 19. Upon arriving at Hughes, she met several of her friends. Ambrose arrived at the benefit around three o’clock in the afternoon and remained at Hughes until she was taken to a hospital by ambulance after the accident around midnight. During her time at the bar, Ambrose consumed about eight beers. Id. at 24-25.

After the benefit ended, Ambrose remained at Hughes with her childhood friend, Kathy Dodd (hereinafter “Dodd”), She and Dodd sat the far end of the bar in the back of Hughes. Ambrose and Dodd were left alone for the most part; however, they were talking to, joking around with, the bartender, Noel Muldoon (“Muldoon”). Id at 38.

At around midnight, Ambrose, in an effort to give Muldoon a “high-five,” moved from her position at the end of the bar, to the employee side of the bar through an opening near the end of the bar. When asked where the opening was she testified that she took “one (step)...it was just right at the end of the bar.” Ambrose dep. at 43. According to Ambrose, after she took one step behind the bar she “did not get much further...I landed and ended up in the basement.” Id. She denies seeing the opened cellar door behind the bar prior to her fall, or observing an employee of Hughes, including Muldoon, going down to the basement area to retrieve anything. Id. at 44-45. She did not indicate to Dodd and Muldoon that she was going to step around the bar and that it was “a spontaneous thing.” Id. at 49. She recalls her right foot hitting the basement floor first, and subsequently tumbling to the ground, and that she could not stand up after her fall because she was hurt. Id. at 61, 63.

According to the testimony of Muldoon, he started bartending and serving drinks to Ambrose and Dodd at around 10:30 that night. Muldoon dep. at 23. During that time, for about an hour, Muldoon was refilling a cooler behind the bar with beer from a storage cellar under the bar. The cellar was accessed through a “trap” door located behind the bar. The bar is approximately 30 to 40 feet in length and in an “L” shape. Muldoon dep., at 14. Before the accident he was going down the cellar stairs and Ambrose and Dodd were throwing napkins at him. Id. at 30. According to Muldoon, Ambrose and Dodd were sitting right in front of the

cooler he was filling. Id. at 28. He also testified the cellar door had been open for at least a half an hour before the accident. Id. at 31.

There is no policy or rule to warn patrons or employees about the trap door when open, such as a barricade, sign, or other preventative measure. Id. at 34. Further, there is no gate, door, or rope preventing members of the public from walking behind the bar. Id. Muldoon testified, however, that [the trap door] is clear to see you can see it. Id. at 35. Before the night of the incident, Muldoon had never witnessed a patron walk around the end of the bar. Muldoon dep. at 50.

Both Muldoon and Dodd witnessed plaintiff's fall, and ran down the stairs to check on Ambrose. When Muldoon and Dodd got down into the cellar, Muldoon asked Ambrose if she was okay to which he recalls her saying "Yes, I am fine. I'm such an idiot." Id. at 47.

Dodd testified that at the time of the accident she was laughing at something Muldoon said and Ambrose "came around and I guess you have to take two steps to the right and you are behind the bar, and then maybe a step and a half, then you would fall down that trapdoor...she just disappeared." Dodd dep at 23. Before the accident, Dodd did not notice that the door to the basement was opened. Id. at 28. She did not recall whether she observed Muldoon or anyone else going up and down the cellar stairs on the night of the accident. Id. at 27, 28. She had never seen a customer go behind the bar before, and had never been behind the bar or in the cellar prior to the night of the incident. Id. at 25, 28-29.

The record includes an affidavit and report from Stanley H. Fein (Fein), a New York State professional engineer retained by plaintiffs, who investigated the accident site on December 2, 2013, and reviewed the deposition transcripts of Ambrose, Muldoon, and Dodd. Fein opines that:

the trap door was extremely dangerous and hazardous because: (1) the door should never be in open position without placing something onto or around the stairwell to prevent anyone from falling into it, and that the good and accepted engineering practice is to have a bell or an alarm, or to have a door cordoned off when in the open position to prevent injury, (2) good and accepted engineering safety practice for design of a bar of this type is to have a folding portion of the top of the bar across the opening so that persons would be stopped from entering the bar by the counter, and (3) there were also no caution or warning signs advising of the existence of the potential hazard. Fein Affidavit, ¶s 10, 11.

Fein also cites to New York City Building Code § 1005.2, which relates to the width of door openings and the path of egress travel, and New York City Construction Code § 28-301.1 stating that all structures must be maintained in a safe condition.

Defendant moves for summary judgment, arguing that there was no hazardous condition since the trapdoor was not structurally defective in violation of the Building Code or otherwise unsafe. Furthermore, although the trap door was open, defendant argues that this fact does not provide a basis for a finding of negligence, since it was not reasonably foreseeable that Ambrose would have gone behind the bar to an employees-only area, and that Ambrose's actions are the sole proximate cause of her injuries. Defendant also asserts that the open trap door was "open and obvious" condition, particularly as it was opened for at least 30 minutes before the accident and Muldoon was using the cellar stairs prior to the incident.

Plaintiffs counter that summary judgment is not warranted as Ambrose did not and could not see the trap door from where she was sitting at the end of the bar, and that there are factual issues as to whether the accident was reasonably foreseeable under the circumstances.

Plaintiffs further contend that the issue of whether a condition is "open and obvious" is generally a question for the jury to decide, citing Westboro v. WR Activities- Acbrerea Mkts., 5 AD3d 69, 72 (1st Dept 2004). Plaintiffs also point out that there were no signs or other warning to behind

the bar with regard to the trap door or stating that customers were not permitted behind the bar. Plaintiffs further contend that Fein's affidavit supports their position that the trap door was a dangerous condition and a proximate cause of Ambrose's injuries.

In support of their opposition, plaintiffs submit Ambrose's affidavit, along with two photographs of the bar area. Ambrose, referring to the photographs, states that the bar itself obstructed her view while she was standing or sitting on the customer side of the bar, and therefore she was unable to see the floor behind the bar area where the bartender walked and where the trap door is located.

In reply, defendant argues that Fein's affidavit should be disregarded, as it is conclusory and not adequately supported by any references to specific and currently applicable safety standards or practices. In addition, defendant asserts that the two provisions cited by Fein are insufficient to provide such standards. As for Section 1005.2 of the New York State Building Code, defendant argues that it is inapplicable by its own terms since it only applies to "doors" and "path of egress travel." With respect to New York City Construction Code § 28-301.1, defendant argues that it is too general of a standard to serve as a predicate for liability, citing Miki v. 335 Madison Avenue, LLC., 93 AD3d 407, 408 (1st Dept 2012). Defendant also argues that Ambrose's position that she did not see the opening or observe Muldoon using the stairs before the accident is flatly contradicted by evidence in the record, and since the trap door was plainly visible and the accident not foreseeable it should be granted summary judgment.

Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tending sufficient evidence to eliminate any material issues of fact from the case ..." Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852

(1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

An owner or possessor of realty owes a duty of reasonable care to maintain the premises in a reasonably safe condition. Hoberman v. Kids R Us, Inc., 187 A.D.2d 187, 190 (1st Dept 1993). An open trap door has been held to constitute an unsafe condition that provides a basis for liability where there is a showing of negligence. Cooper v. Burt's Reliable, Inc., 105 A.D.3d 886 (2d Dept 2013)(overturning jury verdict for defendant whose employee left trap door open causing injury to plaintiff finding that "a reasonable person should have been aware that leaving the trapdoor open created an unsafe condition"); Biffer v. Queen Curtain Shop, Inc., 17 A.D.2d 960, 960 (2d Dept 1962)(writing that "one who maintains a trap door on business premises has the duty to exercise reasonable care to prevent injury to those rightfully on the premises"); see generally, 86 NYJur.2d Premises Liability § 438.

Moreover, when, as here, the defendant is the operator of a business where the trap door is located, a plaintiff need not show that the open door constituted a structural defect or building code violation, and the cases cited by defendant are not to the contrary since they concern the potential liability of out-of-possession owners. See e.g., Baez v. Barnard College, 71 A.D.3d 585 (1st Dept 2013)(holding that property owner could not be held liable for trapdoor configuration in tenant's business which was not a building code violation or a structural defect); Almanzar v. Picasso's Clothing, Inc., 281 A.D.2d 341, 342 (1st Dept. 2001)(dismissing plaintiff's complaint against defendants, out-of-possession owners where "[t]here was no evidence that the trap door was normally kept open for structural reasons"). Thus, while the court agrees with defendant

the code violations cited by plaintiffs' expert are either inapplicable or too general to provide a basis for defendant's liability, such a finding is not dispositive here.

As for defendant's argument that the trap door was in plain view and therefore an open and obvious condition, the court notes that the issue of "whether a condition is open and obvious is generally a jury question and the court should only determine that a risk was open and obvious as a matter of law when the facts compel such conclusion." Westboro v. WR Activities-Cabrera Mkts., 5 A.D.3d at 72. Moreover, "the mere fact that a defect or hazard is capable of being discerned by a careful observer is not the end of the analysis. The nature or location of some hazards, while they are technically visible, make them likely to be overlooked." Id.; see also Thornhill v. Toys "R" Us NYTEX, Inc., 183 A.D.2d 1071 (3rd Dept 1992)(finding that based on the surrounding circumstances it could not be determined as a matter of law that the raised platform over which plaintiff fell was an open and obvious condition even though plaintiff initially saw the platform and avoided it). In any event, a finding that a condition is open and obvious does not eliminate a defendant's duty to maintain the property in a reasonably safe condition. Westboro v. WR Activities-Cabrera Mkts., 5 A.D.3d at 73. See generally, O'Connor-Miele v. Barhite & Holzinger, Inc., 234 A.D.2d 106 (1st Dep't 1996).

In addition, even if Muldoon's testimony supporting this position is sufficient to make a prima facie showing that the trap door was open and obvious, plaintiffs have controverted this showing since both Ambrose and Dodd testified that they did not notice the opening before Ambrose fell. In addition, in her affidavit, Ambrose further explained that the bar prevented her from seeing the opening.

The remaining issue concerns whether the accident was unforeseeable as a matter of law. "[A] party who possesses real property, either as an owner or as a tenant, is under a duty to

exercise reasonable care to maintain that property in a safe conditionHowever, there is no legal duty to protect against an occurrence which is extraordinary in nature and would not suggest itself to a reasonably careful and prudent person as one which should be guarded against.” Martinez v. Santoro, 273 A.D.2d 448, 448 (2d Dept 2000). In other words, “liability does not attach unless the harm is within the class of reasonably foreseeable hazards that the duty exists to prevent.” Sanchez v. State of New York, 99 N.Y.2d 247, 252 (2002). At the same time, a plaintiff need not demonstrate “the precise manner in which the accident happened, or the extent of injuries, was foreseeable.” Derdiarian v. Felix Contracting Corp., 51 N.Y.2d 308, 315 (1980). In addition, “because ...what is foreseeable and what is normal may be the subject of varying inferences, as is the question of negligence itself, these issues generally are for the fact finder to resolve” Kriz v. Schum, 75 N.Y.2d 25, 34 (1989)(internal citations and quotations omitted); see also, Buckley ex rel. Buckley v. Sun & Surf Beach Club, Inc., 95 N.Y.2d 914 (2000).

Here, while defendant provides evidence that it was unaware of prior occasions of patrons going behind the bar (or falling through the open cellar), such evidence is insufficient to establish, as a matter of law, that no foreseeable danger was created by the existence of an open trap door located a few steps away from the end of the bar, which was not closed off to the public by a door, rope or other barrier, particularly where there were not warning signs. Sec e.g. Havas v. Victory Paper Stock, 49 N.Y.2d 381 (1980)(factual issue existed as to whether injuries sustained by plaintiff when unsecured ramp slipped away from refuse truck while employee and others were attempting to maneuver large bales of waste paper from sidewalk onto truck created a foreseeable risk of harm); Bahan v. Green Bus Lines, Inc., 96 A.D.2d 876 (2d Dept 1989)(holding that “jury was entitled to find that it was foreseeable that the crushing [by bus

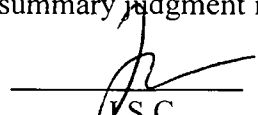
owned by defendant] of a white plastic bottle lying in front of a bus stop spray bleach or other dangerous materials and cause injury to those waiting at the bus stop”) Moreover, given these circumstances, and as the precise manner of the accident need not be foreseeable (Derdiarian v. Felix Contracting Corp., 51 N.Y.2d at 315), the jury question is raised as to whether the defendant should have reasonably foreseen that a patron could inadvertently step behind the bar and sustained an injury as a result of the open trap door.

Finally, defendant’s reliance on Witt v. Hill St. Commercial L.L.C., 59 A.D.3d 217 (1st Dept 2009), to argue that plaintiff’s accident was not foreseeable is misplaced. In Witt, the plaintiff was injured when, while looking for a bathroom at her husband’s office which was closed for business, she opened a door marked “Employees Only” and fell down a flight of stairs. The First Department dismissed the complaint and third party complaint against the defendant building owner and third-party defendant commercial tenant, finding, *inter alia*, that based on the facts of the case, including that the office was closed for business at the time of the accident, “the closed door marked ‘Employee’s Only’ did not constitute a trap or hazardous condition.” Id., at 217. Notably, the holding in Witt does not address whether the accident was foreseeable, and as the defendant bar was open at the time that Ambrose fell, the facts of this case are easily distinguished from the circumstances in Witt.

In view of the above, it is

ORDERED that the defendants’ motion for summary judgment is denied.

DATED: October 28, 2014



 J.S.C.
HON. JOAN A. MADDEN
 J.S.C.