

Bendavid v Cucina Rest.
2015 NY Slip Op 32215(U)
November 16, 2015
Supreme Court, New York County
Docket Number: 155508/12
Judge: Jennifer G. Schechter
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

-----x
SHULA BENDAVID AND MARVIN BENDAVID,
Plaintiffs,

Index No. 155508/12

-against-

CUCINA RESTAURANT, WOODSTOCK CUCINA LLC
AND 105-109 MILL HILL ROAD LLC,
Defendants.
-----x

JENNIFER G. SCHECTER, J.:

Pursuant to CPLR 3212, Defendants move for summary judgment dismissing the complaint. The motion is granted.

Background

Defendant 105-109 Mill Hill Road LLC owns the property located at 109 Mill Hill Road in Woodstock, New York. It rents the property to defendant Woodstock Cucina LLC, which runs Cucina Restaurant (Cucina). Plaintiffs Shula Bendavid and Marvin Bendavid commenced this action to recover for injuries sustained as a result of Mrs. Bendavid's fall on the front steps of Cucina. Plaintiffs urge that defendants were negligent because the steps leading to/from the restaurant were inadequately lit (Affirmation in Support [Supp], Ex A [Complaint] at ¶ 37).

On February 13, 2012, the Bendavids went to Cucina for dinner. They had been there three or four times before in the evening and the lighting conditions were substantially the

same (Supp, Ex E, Shula Bendavid Deposition Transcript [Shula Dep] at 28:4-9; 29:10-24).

On the date of the accident, when the Bendavids arrived, it was already dark and they did not have any difficulty climbing the stairs into the restaurant (Shula Dep at 30:5-8; 36:16-20). Mrs. Bendavid testified that she did not remember the lighting conditions on the date of the accident, except to say that it was dark on the steps (Shula Dep at 32:20-25; 34:1-4). She was, however, able to identify the steps and attest to their perceived width and that they were free of any precipitation or debris (Shula Dep at 34:5-36:10).

Shula Bendavid testified that after her husband went down the stairs, she followed and she "just tripped. [She guessed that she missed] one step . . ." (Shula Dep at 44:17-18). She further testified that she was not looking down at where she was stepping but rather was looking "[i]n front where [she] was heading to" but did not recall specifically what she was looking at" (Shula Dep at 45:22-25; 46:1-4).

Marvin Bendavid testified to substantially the same facts as Shula Bendavid. In addition he testified that, although he did not remember exactly, his recollection was that the photographs defense counsel showed him at the deposition were not accurate in that the steps were darker than they appeared in the photos (Supp, Ex F, Marvin Bendavid Deposition Transcript [MB Dep] at 15:7-20).

Erin Winters, a Cucina employee since 2008, testified that she did not work on the day of the accident (Supp, Ex G, Erin Winters Deposition Transcript [EW Dep] at 22:20-14). She was unaware of any complaints concerning the lighting, condition of the stairs or of any individuals, besides Mrs. Bendavid, tripping or being injured as a result of the lighting by the stairs (EW Dep at 43:4-22).

Michael Sarandon has worked at Cucina on and off since 2007 as a bartender (Supp, Ex H, Michael Sarandon Deposition Transcript [MS Dep] at 5:15-20). He testified that he did not recall any prior incidents on the stairs or anyone ever complaining to him about the lighting or the stairs (MS Dep at 29:8-17).

Analysis

Summary Judgment is a drastic remedy that should not be granted if there is any doubt as to the existence of material triable issues (see *Glick & Dolleck v Tri-Pac Export Corp*, 22 NY2d 439, 441 [1968] [denial of summary judgment appropriate where an issue is "arguable"]; *Sosa v 46th Street Develop. LLC*, 101 AD3d 490, 493 [1st Dept 2012]). The burden is on the movant to make a *prima facie* showing of entitlement to judgment as a matter of law by presenting evidence in

admissible form demonstrating the absence of any disputed material facts. Once the movant has made this showing, the burden then shifts to the opponent to establish, through competent evidence, that there is a material issue of fact that warrants a trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Defendants met their burden of establishing entitlement to judgment. They demonstrated that there was no dangerous condition that they created or had notice of. Cucina employees testified that there have been no other incidents on the restaurant's front steps and that there have been no complaints about the lighting. In fact, plaintiffs had been to the restaurant three or four times before, under the same conditions, and never complained about the lighting or the stairs.

In response, plaintiffs failed to raise a triable issue of fact. Other than their own testimony, plaintiffs failed to provide any evidence that the lighting was insufficient or that had there been more light, Mrs. Bendavid would not have fallen (see *Broodie v Gibco Enters. Ltd*, 67 Ad3d 418 [1st Dept 2009] [testimony alone insufficient as a matter of law to raise triable issue as to adequacy of lighting]; *Branham v Loews Orpheum Cinemas, Inc.*, 31 AD3d 319 [1st Dept 2006], *affd.*

8 NY3d 931 [2007]; *Reyes v La Ronda Cocktail Lounge*, 27 Ad3d 397 [1st Dept 2006] [assertion that area was "dark" or "dim" insufficient]; *Christoforou v Lown*, 120 AD2d 387, 390 [1st Dept 1986] ["It is basic that one alleging inadequate lighting must show a breach of duty of reasonable care" and objective proof is required]; see also Shula Dep at 45:22-25; 46:1-4 [Mrs. Bendavid was not looking down at where she was stepping but rather was looking "(i)n front where (she) was heading to"]). No issue was raised, moreover, with the structural soundness of the steps and it is undisputed that the steps were free of any foreign substance.

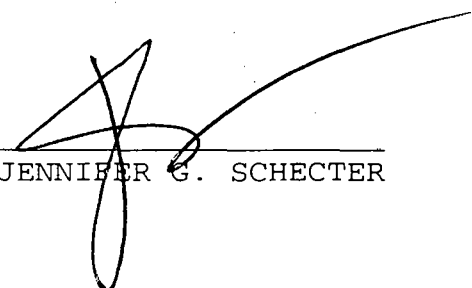
Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed without costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Judgment of the Court.

Dated: November 16, 2015



HON. JENNIFER G. SCHECTER