Shapiro v North 43rd, LLC
2016 NY Slip Op 31423(U)
July 20, 2016
Supreme Court, New York County
Docket Number: 159318/14
Judge: Sherry Klein Heitler

SUPREME COURT OF THE STATE OF NEW YORK
COURTY OF NEW YORK

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JANICE SHAPIRO,

Plaintiff,

-against-

NORTH 43rd, LLC d/b/a TONY'S DINAPOLI, INC. and TRI-STATE MANAGEMENT CORP.,

Defendants.

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Index No. 159318/14
Motion Sequence 002

DECISION AND ORDER

HON. SHERRY KLEIN HEITLER

In this personal injury action, defendants North 43rd, LLC d/b/a Tony's DiNapoli, Inc. and Tri-State Management Corp ("Defendants") move pursuant to CPLR 3212 for summary judgment dismissing the complaint in its entirety on the grounds that the step configuration in Defendants' lower level dining room which allegedly caused plaintiff Janice Shapiro's ("Plaintiff" or "Ms. Shapiro") injuries is not inherently dangerous or defective and that if even such step were to be considered a hazard it was not the proximate cause of Plaintiff's fall. Defendants also seek dismissal as against Tri-State Management Corp. on the ground that it has no interest in or involvement with Tony's DiNapoli, Inc. In opposition Plaintiff argues that there is a triable issue of fact as to whether the step created optical confusion and/or whether a person could reasonably perceive the existence of a change in floor levels where the step was located. For the reasons set forth below, Defendants' motion is granted in part and denied in part.

Ms. Shapiro was injured on March 9, 2014 inside the Tony's DiNapoli restaurant located at 147 West 43rd Street in Manhattan ("the Restaurant").[1] She had gone to the Restaurant for lunch with a group of about 40-45 people from her church group with the plan to see a show thereafter. Upon

[1] Ms. Shapiro was deposed on July 16, 2015. A copy of her deposition transcript is submitted as Defendants' exhibit E ("Shapiro Deposition").

[1]

arriving at the Restaurant, Ms. Shapiro and her husband took the elevator to the lower level where a private dining room is located. When she exited the elevator, she saw the seating area about thirty feet in front of her. While walking toward the seating area she somehow fell. (Shapiro Deposition p. 21-22):

Q You could see the seating area when you stepped off the elevator?
A Yes.
Q When you got off the elevator, was there just one seating area on that level?
A Yes.
Q Did you see other people in your group already seated in that area?
A Yes
Q Approximately how far was that seating area from the elevator; was it directly outside of the elevator . . . or was it a distance?
A A distance. . . .
Q In the first 30 feet you had to traverse to get to where you would sit, what was in that 30-foot area? Were there tables?
A No.
Q. What was in that area?
A. Carpeting, a dark wooden area. I walked to get to the table.
Q. Did you reach the table before the happening of the accident?
A. Absolutely not.
Q. Take me through it step by step now. You got off the elevator?
A Yes.
Q You were headed toward the seating area?
A I was walking to the table and the next thing I knew I was on the floor.

Ms. Shapiro did not know that she had to descend one step before entering the dining area from the elevator area. She testified that the area was dimly lit. She also testified that at the time of her fall she was looking straight-ahead at the tables where her church group was already seated and not at the floor (*id.* pp. 22-23):

Q Before you fell, where were you looking; straight ahead, to the side?
A I was looking straight ahead at the tables. I did not see any obstructions. I was just walking. It was a darkened area. A lot of times in restaurants they lower

the lights so there is more atmosphere or whatever. I don't know why. It was dark. The floor was dark.

Q Did you ever look down at the floor before you fell?

A I don't recall. I would have seen the step if I was looking down. . . .

Q The lighting in the area, in that 30-foot area before you reached the step, was it in the ceiling, was it on sconces on the wall or something else, as you recall?

A. I don't recall.

Q You said it was dim?

A Yes.

Q Could you see the table from the elevator once you got off the elevator?

A Yes.

Q The floor in the 30-foot area between the elevator and where the seating was going to be, do you recall what the surface of the floor was; was it carpet, wood, tile or something else?

A I think it was carpeted . . . Dark brown carpet

As a result of the accident, Ms. Shapiro was taken by ambulance from the Restaurant to a local hospital where she was treated for a fractured shoulder.

The manager on duty at the time of Ms. Shapiro's fall, Mr. James Pappas, was deposed on behalf of the Defendants on August 28, 2015.[2] Mr. Pappas testified that there is one step which divides the two portions of the Restaurant's private dining area. The area before the step, which is closest to the elevator, is covered with "rose" "peach" "tucson" colored porcelain tile (Pappas Deposition pp. 18-19, 28). The dining area below the step has a wooden floor. The step is made out of the same wood as the floor of the lower dining area (23). At the time of the accident there was an area mat on both the floor immediately before and immediately after the step (*id.* pp. 18-19, 22-23):

Q Okay. So, in addition to that dining room surface, which is all one level, is there another area on the lower floor, the bottom of the steps, that's a different level than the dining room surface, itself?

A Yes.

Q And is it up a stair or more than one stair, from the dining room surface, itself?

A It's a step. . . .

[2] A copy of Mr. Pappas' testimony is submitted as Defendants' exhibit G ("Pappas Deposition").

Q When you come up that one step, what is that floor surface made out of?

A Either ceramic or porcelain tile...

Q On the wood surface of the dining area, are there any parts of it that are covered by carpet, or area rugs, or mats, of some kind?

A There is an area rug.

Q And where is that compared to – you said there's the step, compared to where that step is, where is that area rug on the dining area?

A In front of you, as soon as you step off.

* * * *

Q In addition to that area rug . . . that's on the dining room floor, right below the riser, or adjacent to the riser of the step, is there another area rug or mat on the porcelain tile area?

A Yes.

According to Mr. Pappas the two area rugs are different colors. The area mat that lies on the upper area before the step is brown, while the area mat immediately below the step on the dining room floor is red. There are handrails on both sides of the step (*id.* pp. 19, 26-27, 34-35):

Q The area rug that's on the dining room area that we spoke about, what color is that?

A What color? It's a light brown, light brown color, a light brown.

* * * *

Q So, the area rug that you said is on the porcelain floor, that's light brown?

A Yes.

* * * *

Q You said the width of that step is at least three feet wide, is there any handrail on either side of that step?

A Yes.

Q Which side is it on or is it on both sides.

A Both sides.

In addition to his deposition testimony, Defendants submit an affidavit by Mr. Pappas wherein he states that no complaints had been made by any customer or employee regarding the subject step,

the lighting conditions in the dining area, or the handrails prior to and including the date of Ms. Shapiro's accident.[3]

Defendants contend that the dining room's single step was open and obvious, conformed with all applicable New York City building codes, and does not constitute an inherently dangerous or defective condition. Defendants argue that even if the condition was not open and obvious, it was not a proximate cause of Plaintiff's injuries in light of Plaintiff's admission that she was looking straight ahead at the step and thus could not have been deceived by it. Plaintiff argues that Defendants did not take reasonable steps to make the presence of the step known to their customers. Specifically, Plaintiff asserts that the flooring before and after the step are similar in color, that the dining room was dimly lit, and that Defendants' failure to clearly demarcate the step creates the illusion of a flat surface.

DISCUSSION

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action.'" *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]); *see also Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014) (quoting *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). However, "rank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact." *Castore v Tutto Bene Restaurant Inc.*, 77

[3] Mr. Pappas' affidavit, sworn to December 2, 2015, is submitted as Defendants' exhibit I.

AD3d 599, 599 (1st Dept 2010); *see also Kane v Estia Greek Rest., Inc.*, 4 AD3d 189, 190 (1st Dept 2004).

In support of its motion, Defendants submit an affidavit by Joseph M. Danatzko, P.E., who inspected the Restaurant's lower level on November 4, 2015.[4] Among other things, he avers that the stair riser at issue was properly constructed, maintained safe for its intended use, and did not violate any New York City building codes or standards. In terms of lighting, Mr. Danatzko measured and found that the illumination levels above the step exceeded the minimum requirements under the 1968 New York City Building Code, the applicable code at the time the dining area was constructed. He also noted "visual cues of a change in walking surface and height differential" as follows (Danatzko Report ¶ 11):

> . . . differences in color between floor finishes in the area of the subject single riser; a doorway separating a stairway area from the cellar dining room; floor mats of differing color located at the top and bottom of the step; furniture located in the dining room area; friction strips near the nosing of the subject single riser that are of different color than the nosing finish; the guardrails that are adjacent to the subject single riser.

These cues, according to Mr. Danatzko, "provided indication that a change in walking surface and height differential existed for persons making reasonable observations along their intended path of travel." *Id.*

Business proprietors have a duty to exercise reasonable care in maintaining their properties in a reasonably safe condition. *Di Ponzio v Riordan*, 89 NY2d 578, 582 (1997); *Basso v Miller*, 40 NY2d 233, 241 (1976). While they are not insurers of the safety of people on their premises (*see Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 519 [1980]), they must take reasonable care to ensure that "customers shall not be exposed to danger of injury through conditions in the store or at the entrance which [it] invites the public to use." *Miller v Gimbel Bros., Inc.* 262 NY 107, 108 (1933); *see also*

[4] Mr. Danatzko's affidavit, sworn to December 3, 2015, is submitted as Defendants' exhibit J ("Danatzko Report"). While Mr. Danatzko inspected the premises more than a year after Plaintiff's accident, he was informed by Mr. Pappas that the rises, floor finishes, and light fixtures had not been altered (id. at ¶ 8).

Hackbarth v McDonalds Corp., 31 AD3d 498, 498 (2d Dept 2006). This duty to maintain property in a reasonably safe condition must be viewed in light of all the circumstances, including the likelihood of injury to third parties, the potential seriousness of the injury, and the burden of avoiding the risk. *Branham v Loews Orpheum Cinemas, Inc.*, 31 AD3d 319, 322 (1st Dept 2006).

"To impose liability upon a defendant in a trip-and-fall action, there must be evidence that a dangerous or defective condition existed, and that the defendant either created the condition or had actual or constructive notice of it." *Dennehy-Murphy v Nor-Topia Serv. Ctr., Inc.*, 61 AD3d 629, 629 (2d Dept 2009). Summary judgment is appropriate if the condition complained of is "both open and obvious and, as a matter of law, not inherently dangerous" *Broodie v Gibco Enters., Ltd.*, 67 AD3d 418, 418 (1st Dept 2009). "[T]he question of whether a condition is open and obvious is generally a jury question, and a court should only determine that a risk was open and obvious as a matter of law when the facts compel such a conclusion." *Westbrook v WR Activities-Cabrera Mkts.*, 5 A.D.3d 69, 72 (1st Dept 2004). "To establish an open and obvious condition, a defendant must prove that the hazard 'could not reasonably be overlooked by anyone in the area whose eyes were open.'" *Powers v 31 E 31 LLC*, 123 AD3d 421, 422 (1st Dept 2014) (*citing Westbrook*, 5 AD3d at 72). "The burden is on the defendant to demonstrate, as a matter of law, that the condition that caused the plaintiff to sustain injury was readily observable by the plaintiff employing the reasonable use of his senses." *Powers*, 123 AD3d at 422.

Defendants established their *prima facie* entitlement to judgment as a matter of law by submitting evidence which demonstrated that the subject step complied with the relevant building code requirements and that there were visual cues which would make it open and obvious to a reasonable patron. But compliance with industry codes and standards is not entirely determinative of whether Defendants' maintained the Restaurant in a reasonably safe condition. *See Kellman v 45 Tiemann Associates, Inc.*, 87 NY2d 871, 872 (1995). As set forth in *Langer v 116 Lexington Avenue, Inc.*, 92

AD3d 597, 599 (1st Dept 2012), a step may be inherently dangerous, notwithstanding its compliance with building codes, if it creates "optical confusion":

> A condition that is visible to one "reasonably using his or her senses" is not inherently dangerous . . . . . However, a step may be dangerous where the conditions create "optical confusion"--the illusion of a flat surface, visually obscuring the step . . . "[F]indings of liability have typically turned on factors, such as inadequate warning of the drop, coupled with poor lighting, inadequate demarcation between raised and lowered areas, or some other distraction or similar dangerous condition". . . . [internal citations omitted]

In *Saretsky v 85 Kenmare Realty Corp.*, 85 AD3d 89 (1st Dept 2011), the plaintiff presented evidence that the concrete surface of the step and the sidewalk at the bottom of the step were similar shades of gray and that the painted line marking the top edge of the transition step was very worn. The court found the similarity in surface colors and the defendant's failure to demarcate the edge of the step created the illusion of a level surface (*id.* at 92-93). In *Chafoulias v 240 E. 55th Street Tenants Corp.*, 141 AD2d 207 (1st Dept 1988), the plaintiff fell down two stairs in a building's vestibule while waiting for her real estate agent with whom she had an appointment to view one of the apartments. The floor tile of the upper vestibule platform, the stairs, and the first few inches of the lower platform were the same color and there was no handrail or bannister on either side, creating optical confusion. *See also Byrne v Etos LLC*, 2014 NY Misc. LEXIS 2963, *10 (Sup. Ct. NY Co. July 2, 2014, Silver, J.) (question of fact whether the use of one carpet of the same color across the entire floor created an optical confusion)

A hazardous condition is generally not found where the step is clearly demarcated and there are other factors which obviate the risk of optical confusion. In *Langer*, photographs showed that four reflective strips were positioned parallel to the step. A "Step Down" sign with an arrow pointing diagonally downward toward the step was placed on the wall near the entrance which was visible to anyone walking down the hallway. Also of significance was the plaintiff's description of the strips as "bright" and the lighting in the hallway and banquet room as "well-lit." *Id.* at 599. In *Franchini v American Legion Post*, 107 AD3d 432 (1st Dept 2013), upon which Defendants rely, plaintiff tripped

over a single step which separated a catering facility from a patio. In granting the catering facility summary judgment, the court explained that the concrete step was a different color than the tiled floors inside the building. And in *Bittar v New Growing, Inc.*, 94 AD3d 630 (1st Dept 2012), plaintiff fell over a step separating the dining area from the restroom inside the defendant's restaurant. The court awarded the restaurant summary judgment because the plaintiff testified that the lighting was adequate and there were several signs warning of the drop. *See also Varon v NYC Department of Education*, 123 AD3d 810, 810-811 (2d Dept 2014) (top of the riser was painted red in contrast with the rest of the bathroom floor and there were warning signs outside the bathroom door); *Bretts v Lincoln Plaza Associates, Inc.*, 67 AD3d 943, 944 (2d Dept 2009) (gold-color nosing contrasted with tile patterns above and below step); *Broodie v Gibco Enterprises, Ltd.*, 67 AD3d 418, 418 (1st Dept 2009) (step painted black and white "so as to be visible even in the low light provided by the recessed ceiling bulb above" and black and yellow warning sign "caution watch your step" posted in the vicinity).

In this case, the photographs annexed to the Danatzko Report corroborate a great deal of Mr. Pappas' testimony. The upper portion of the dining area appears to have been covered in a light peach colored porcelain tile, whereas the lower dining area below the step appears to be covered in brown wood planks. The area rug on the upper level is a brownish-gray color, while the area rug on the lower level is dark red. There are also what appear to be brown guardrails on both sides of the step, but no handrails.

The photographs do not comport with Ms. Shapiro's testimony regarding the illumination level in the dining area on the day of the accident. The proffered photographs are fairly bright, but Ms. Shapiro testified that the dining area was dark and dimly lit when she fell. Under the conditions described by Ms. Shapiro, a reasonable person could find it difficult to differentiate between the upper and lower levels, particularly since the step itself appears to be covered in the same colored wood as the lower level flooring. Illustrative of this point are the two photographs produced by Defendants at

Ms. Shapiro's deposition.[5] While they depict the same location as the photographs annexed to the Danatzko Report, the Shapiro deposition photographs are darker, making it extremely difficult to ascertain where the step ends and the lower level begins and virtually impossible to see the red area rug against the dark wood floor. Thus, even though the various floors are of different colors and textures, a jury could reasonably determine that the step was a hazard by reason of the dim lighting in the room.

Relying on *Langer* and *Franchini*, Defendants argue that Ms. Shapiro could not have been deceived by any optical illusion because she was not looking down at the time of her fall and she conceded that had she been looking down she might have seen the step. In reality, people ordinarily look ahead of them while they walk or else they would bump into objects and people in front of them and would not see warning signs of hazardous conditions. The primary reason summary judgment was granted in *Langer* and *Franchini* was because the conditions in those cases did not create optical confusion. The step over which the *Langer* plaintiff fell could not have been more obvious. The area was well-illuminated, the defendant installed reflective strips to mark the change in elevation, and several warning signs were posted nearby. In *Franchini*, the plaintiff fell over a step that separated an indoor catering facility from an outside patio. Nothing about that situation rendered the step dangerous. The case at bar presents a different scenario. The photographs presented at the Shapiro deposition depict a dark area with dark floors and dark area mats. Thus, while Defendants may present evidence that Ms. Shapiro was looking ahead of her at the time of her fall, this does not support Defendants' request for summary judgment in the circumstances of this case. Accordingly, I find there is a material issue of fact whether the step at issue and the illumination thereof constituted a hazard or optical confusion. In this regard, North 43rd, LLC d/b/a Tony's DiNapoli, Inc.'s motion is denied.

It is of no moment that Plaintiff did not submit an expert report to contest the Danatzko Report. Since Plaintiff's case does not depend upon the existence of a structural defect or code violation,

[5] Plaintiff's exhibit C.

whether or not the colors and setup of the area where Plaintiff fell created a hazard is a matter within the common knowledge and experience of jurors. *Chafoulias*, 141 AD2d at 211; *Kulak v Nationwide Mut. Ins. Co.*, 40 NY2d 140, 148 (1976); *Brown v City of New York*, 309 AD2d 778, 779 (2d Dept 2003); *see also* Prince, Richardson on Evidence, §§ 2-208, 7-202 (Farrell 11th Ed).

Finally, defendant Tri-State Management argues that it did not own or lease the Restaurant, was not responsible for maintaining the Restaurant, and was not involved with the Restaurant's day-to-day operations.[6] Plaintiff's opposition does not address such contention and such facts are therefore deemed to be conceded.

In light of the foregoing, it is hereby

ORDERED that Defendants' motion is granted only with respect to defendant Tri-State Management Corp., and is otherwise denied; and it is further

ORDERED that all claims against Tri-State Management Corp are hereby severed and dismissed; and it is further

ORDERED that this action shall continue as against defendant North 43rd, LLC d/b/a Tony's DiNapoli; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED: 7.20.16

SHERRY KLEIN HEITLER, J.S.C.

[6] See Affidavit of Joseph Shipgel, sworn to December 4, 2015, submitted as Defendants' exhibit L.