

**Zuniga-Iscoa v Pasta La Vista, Inc.**

2017 NY Slip Op 30467(U)

March 7, 2017

Supreme Court, New York County

Docket Number: 153670/2013

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 55

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MARIA ZUNIGA-ISCOA,

Plaintiff,

**DECISION/ORDER**  
**Index No. 153670/2013**

-against-

PASTA LA VISTA, INC. d/b/a PAZZA NOTTE,

Defendant.

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PASTA LA VISTA, INC. d/b/a PAZZA NOTTE,

Third-Party Plaintiff,

-against-

THE CLARIDGES COMPANY,

Third-Party Defendant.

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HON. CYNTHIA KERN, J.:

Plaintiff commenced the instant action seeking to recover damages for injuries she allegedly sustained when she slipped and fell in a restaurant operated by defendant/third-party plaintiff Pasta La Vista, Inc. d/b/a Pazza Notte (“Pazza Notte”), which is located in a building owned by third-party defendant The Claridges Company (“Claridges”). Pazza Notte now moves for an Order pursuant to CPLR § 3212 granting it summary judgment dismissing plaintiff’s complaint and any crossclaims asserted against it. Claridges cross-moves for an Order pursuant to CPLR § 3212 granting it summary judgment on its crossclaim for contractual indemnification against Pazza Notte and for summary judgment dismissing plaintiff’s complaint and any crossclaims asserted against it. For the reasons set forth below, Pazza Notte’s motion and Claridges’ cross-motion are both denied.

The relevant facts are as follows. On March 29, 2012, plaintiff attended a party at a restaurant located at 1375 Sixth Avenue, New York, New York (the “premises”). Pazza Notte leases the premises from Claridges, the owner of the premises. Plaintiff testified during her deposition that she was walking

from the bathroom in the back room of the premises, used for the private party, to the front room of the premises when she slipped and fell on a ramp leading from the back room to the front room. She further testified that she thought her “foot went under and [she] just slipped and fell” and that she “didn’t really expect that there was a step there.”

The court first considers the portion of Pazzo Notti’s motion for summary judgment dismissing plaintiff’s complaint on the ground that the ramp on which plaintiff slipped and fell is not a defective condition. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim.” *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See id.*

Landowners and lessees have a “duty to maintain their property in a reasonably safe condition in view 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.” *See Branham v. Loews Orpheum Cinemas, Inc.*, 31 A.D.3d 319, 322 (1<sup>st</sup> Dept 2006); *Barth v. City of New York*, 307 A.D.2d 943, 944 (2d Dept 2003). However, in order for a landowner or lessee to be held liable to a plaintiff for an allegedly defective condition upon the property, “it must be established that a defective condition existed, and that the defendant landowner or lessee affirmatively created the condition or had actual or constructive notice of its existence.” *Zamor v. Dirtbusters Laundromat, Inc.*, 138 A.D.3d 1114, 1114 (2d Dept 2016).

In the present case, Pazzo Notti has made a *prima facie* showing of its entitlement to summary judgment dismissing plaintiff’s complaint on the ground that the ramp on which plaintiff slipped and fell is not a defective condition. Pazzo Notti has submitted the report of its engineering expert, Michael Walsh, P.E. (“Walsh”), stating that the ramp complies with the New York City Building Code of 1968 (“NYC Building Code”) as it has an incline ratio of 1:12 and level landings on either side that are at least 60 inches

in length. See NYC Building Code 4.8.2 (requiring ramps to have a slope not steeper than 1:12); NYC Building Code 4.8.4 (requiring landings to be level and at least 60 inches long “clear”). Walsh further states that he tested the ramp’s slip resistance using a calibrated Variable Incidence Tribometer both when the surface was dry and wet. He states that the ramp has a slip coefficient value of 0.82 when dry and 0.62 when wet, which meets the industry standard recommending that surfaces have a slip coefficient value of at least 0.50. See American Society of Testing Materials Code (“ASTM”) D2047-04.

However, plaintiff has raised an issue of fact as to whether the ramp on which plaintiff slipped and fell is a defective condition. Plaintiff has submitted the affidavit and reports of its architecture expert, Marc J. Landow (“Landow”), stating that the ramp is actually comprised of two separate adjacent ramps with different slopes. According to Landow’s affidavit and reports, the upper ramp has an incline ratio greater than 1:12 and thus does not comply with the NYC Building Code. Further, Landow states in his affidavit and reports that the ramps do not comply with the NYC Building Code because they do not have clear landings of 60 inches on either side as there is fixed banquet seating at the top and bottom of the ramps. Landow also states that “there is no universally accepted standard for what represents a safe slip coefficient as differing test methods yield differing results.” Landow’s expert affidavit and reports present a conflicting opinion raising an issue of fact as to whether the ramp on which plaintiff slipped and fell is a defective condition and thus the portion of Pazza Notte’s motion for summary judgment dismissing plaintiff’s complaint on the ground that the ramp on which plaintiff slipped and fell is not a defective condition is denied.

Pazza Notte’s argument that it is entitled to summary judgment dismissing plaintiff’s complaint on the ground that Claridges is solely liable to plaintiff for negligence is unavailing as Pazza Notte has failed to cite any case law holding that if Claridges can be held liable to plaintiff for negligence, Pazza Notte cannot be held liable.

The portion of Pazza Notte’s motion for summary judgment dismissing Claridges’ crossclaims against it is denied as Pazza Notte has failed to provide any analysis as to why the court should grant it summary judgment dismissing these crossclaims.

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The court next considers Claridges' cross-motion for summary judgment, which Claridges concedes was untimely made beyond the time period set forth by the court's rules for the service of dispositive motions. An untimely cross-motion for summary judgment may be considered "where a timely motion for summary judgment was made seeking relief 'nearly identical' to that sought by the cross motion."

*Filantino v. Triborough Bridge & Tunnel Auth.*, 34 A.D.3d 280, 281 (1<sup>st</sup> Dept 2006) (internal citation omitted).

In the present case, the court will not consider the portion of Claridges' cross-motion for summary judgment on its crossclaim for contractual indemnification and for summary judgment dismissing Pazza Notte's crossclaims against it as this relief is not nearly identical to that sought by Pazza Notte in its timely motion. The court will consider the portion of Claridges' cross-motion for summary judgment dismissing plaintiff's complaint on the ground that the ramp on which plaintiff slipped and fell is not a defective condition, which Claridges supports by adopting Pazza Notte's arguments in support of its nearly identical motion and submitting the report of its own engineering expert who concurs with Walsh's conclusions. However, the court denies this portion of Claridges' cross-motion for the same reason the court denied the portion of Pazza Notte's motion for summary judgment dismissing plaintiff's complaint, as set forth above.

Accordingly, Pazza Notte's motion for summary judgment and Claridges' cross-motion for summary judgment are denied in their entirety. This constitutes the decision and order of the court.

DATE: 3/7/17

*CK*  
KERN, CYNTHIA S., JSC  
HON. CYNTHIA S. KERN  
J.S.C.