

**Cronin v 14 E. 47th Pub Inc.**

2017 NY Slip Op 31371(U)

June 27, 2017

Supreme Court, New York County

Docket Number: 161684/2014

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

-----X  
ANN CRONIN,

Plaintiff,

-against-

14 EAST 47TH PUB INC., CONNOLLY'S PUB &  
RESTAURANT, CONNOLLY'S BAR &  
RESTAURANT, 226 ASSOCIATES, L.L.C. and  
MCDONALD'S CORPORATION,

Defendants.

-----X  
HON. CAROL R. EDMEAD, J.S.C.:

**DECISION/ORDER**

Index No.: 161684/2014

Mot. Seq. 003

**MEMORANDUM DECISION**

This is an action for, *inter alia*, personal injury. Defendants, 14 East 47th Pub Inc., Connolly's Pub & Restaurant, Connolly's Bar & Restaurant, 226 Associates, L.L.C. ("Defendants") now move pursuant to CPLR 3212 for summary judgment dismissing plaintiff, Ann Cronin's ("Plaintiff") amended complaint ("Complaint").<sup>1</sup>

*Factual Background*

Plaintiff was dining on the first floor of Defendants' restaurant, Connolly's Bar and Restaurant. Subsequently, Plaintiff walked to use the restroom on the same floor. Upon her exit from the restroom, Plaintiff walked through a doorway and fell down a stairway. Consequently, Plaintiff filed the Complaint, alleging that, *inter alia*, Defendants' negligence caused the condition that caused Plaintiff's fall (Compl. ¶¶ 45-47), namely, the improper placement of the subject stairway; absence of signs warning Plaintiff of the stairway; and inadequate lighting in

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<sup>1</sup> Plaintiff discontinued her action against McDonald's Corporation pursuant to a stipulation of discontinuance dated April 30, 2015.

the area where Plaintiff's accident occurred (Platek Aff., Ex. C, Plaintiff's Amended Verified Bill of Particulars at ¶6).

*Defendants' Motion*

In support of their motion, Defendants argue that the affidavits of their expert Scott Silberman, P.E. ("Silberman"), a professional engineer licensed in New York State, and Ardell Reilly ("Reilly"), the manager of Connolly's Bar and Restaurant, and the photographic evidence<sup>2</sup> depicting the accident location, establish that: the subject stairway was not improperly placed; the area where Plaintiff's accident occurred was adequately illuminated; and the signs adjacent to the subject stairway adequately warned Plaintiff of the stairway. Further, it was Plaintiff's carelessness that caused her accident.

Moreover, Plaintiff's deposition testimony is insufficient to establish a triable issue of fact as to whether the lighting in the area where Plaintiff's accident occurred was inadequate. Additionally, Plaintiff's testimony establishes that she has no recollection of how she fell, and therefore, she is unable to establish what caused her accident. Finally, Plaintiff does not allege that the subject stairway was defective.

*Plaintiff's Opposition*<sup>3</sup>

In opposition, Plaintiff first argues that her inability to recall precisely how she fell is insufficient to warrant summary judgment. Further, the photographic evidence and Plaintiff's testimony demonstrate that Silberman's affidavit and Reilly's deposition testimony and affidavit

<sup>2</sup> Defendants' state that the photographs submitted as exhibits to Silberman's affidavit, which were submitted to the Court as an exhibit to Defendants' motion, were poor reproductions. Defendants submit the appropriate photographs as Exhibit A to their Reply.

<sup>3</sup> In a footnote, the Reply argues that the Opposition should not be considered, as it is untimely. However, courts have "discretion to overlook late service where the nonmoving party sustains no prejudice" (*Jordan v. City of N.Y.*, 38 A.D.3d 336, 338, 833 N.Y.S.2d 8, 11 [1st Dept 2007]). Since Defendants failed to demonstrate any prejudice resulting from the untimely Opposition, Defendants' request is denied.

inaccurately describe the accident location. Specifically, Reilly's testimony that "one has to walk through an archway and proceed two (2) to three (3) feet" (Platek Aff., Ex. E, Affidavit of Ardell Rielly, at ¶5) to access the subject stairway, and that the subject stairway is in the "opposite direction from the bathroom door than the booth where [Plaintiff] was sitting" (¶10) are inaccurate. Plaintiff's testimony, on the other hand, is corroborated by the photographic evidence. Further, Reilly and Silberman only refer to the distance from the entrance of the bathroom to the steps, but the relevant distance of measurement is from the edge of the open bathroom door to the stairway. Moreover, since the bathroom door opened outward, it would have obstructed Plaintiff's view of the hallway that leads back to the dining room. The open bathroom door "naturally guided the plaintiff towards the stairway" where her accident occurred (Flynn Aff., at ¶18).

Additionally, the layout of the accident location renders the hallway indistinguishable from the stairway landing. The paneling on the walls in the area where Plaintiff's accident occurred is identical, and with the "exception of a narrow strip, the flooring on the landing is the same" as in the hallway leading into the doorway (¶22). Upon exiting the bathroom, there were no visual cues to signal that Plaintiff was not walking in the hallway leading to the dining room.

Finally, Defendants' failed to demonstrate that the lighting in the accident location was adequate. Specifically, the photographs attached as exhibits to Silberman's affidavit show that the lighting was inadequate.

#### *Defendants' Reply*

In reply, Defendants' argue that Plaintiff fails to rebut Defendants' showing that the placement of the stairway was not dangerous. Plaintiff speculates that the opened bathroom door

guided her towards the accident location. Further, Plaintiff fails to submit measurements contradicting Silberman's measurement of the distance from the bathroom to the doorway leading to the stairway. Plaintiff does not accurately recall how many steps she walked from the bathroom door to the stairway. Additionally, Plaintiff fails to address Silberman's assertion that the lighting in the accident location was adequate to illumine the signs and subject stairway.

#### *Discussion*

"[T]he proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Ostrov v. Rozbruch*, 91 A.D.3d 147, 152 [1st Dept 2012]; see also *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]). "Once such a *prima facie* showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action" (*Cabrera v. Rodriguez*, 72 A.D.3d 553, 553-54 [1st Dept 2010]). "On a motion for summary judgment, issue-finding, rather than issue-determination, is key" (*Shapiro v. Boulevard Hous. Corp.*, 70 A.D.3d 474, 475 [1st Dept 2010]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 231 [1978]).

It is well established that a landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances (*Basso v. Miller*, 40 N.Y.2d 233, 241, 386 N.Y.2d 564 [1976]; *Pappalardo v. New York Health & Racquet Club*, 279 A.D.2d 134, 141-142, 718 N.Y.2d 287 [2000]; *Walsh v. Super Value, Inc.*, 76 A.D.3d 371, 375 [2d Dept 2010]). Moreover, "[a] defendant moving for summary judgment has the initial burden of showing that it did not create a dangerous condition, or have actual or constructive notice of a dangerous

condition” (*Rodriguez v. 705-7 E. 179th St. Hous. Dev. Fund Corp.*, 79 A.D.3d 518, 913 N.Y.S.2d 189 [2010]).

Defendants have established their *prima facie* entitlement to summary dismissal by demonstrating that: the subject stairway was not improperly placed; the signs adequately warned of the subject stairway; and the lighting adequately illuminated the area where Plaintiff’s accident occurred (*see Remes v. 513 W. 26th Realty, LLC*, 73 A.D.3d 665, 903 N.Y.S.2d 8 [1st Dept 2010]).

Reilly’s affidavit establishes that the subject stairway is “at least” six to seven feet in the opposite direction from the bathroom door (Platek Aff., Ex. E, at ¶10). Reilly attested that there is a spotlight illuminating the landing at the top and bottom of the stairway and rope lights placed on the left side of the stairway (¶¶8-9). Additionally, all the lighting was in working condition at the time of Plaintiff’s accident. Reilly establishes that at the time of Plaintiff’s accident there were two signs warning of the stairway on a wall adjacent to the stairway (¶6). One sign indicates “Please watch your step.” Immediately to the right of the first sign is a second sign depicting the image of a stairway with the text, “stairs” printed underneath. Further, Reilly’s unsigned deposition<sup>4</sup> indicates that configuration of the the accident location remained the same for approximately eight and a half years, including through the date of Plaintiff’s accident (Flynn Aff., Ex. A, Deposition of Ardell Reilly, at 20:21-22-4). Reilly is unaware of any complaints regarding the condition of the subject staircase (13:11-14), pitch or steepness of the subject stairway (30:19-23), and level of illumination in the accident location (33:13-19).

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<sup>4</sup> Although, as Defendant’s point out in reply, Reilly’s deposition transcript is unsigned, the transcript was certified and not disputed for accuracy (*Ortiz v. Lynch*, 105 A.D.3d 584, 965 N.Y.S.2d 84 [1st Dept 2013]).

Next, the affidavit of Silberman indicates that the subject bathroom door does not open over the subject stairway (Platek Aff., Ex. F, Affidavit of Scott Silberman at ¶9). In fact, Silberman's affidavit states that the distance from the doorway to enter the area where the stairway is to the lip of the bathroom door measured six feet and six inches (¶11). Further, Silberman attestation that the lighting in the accident location was adequate to illuminate the two signs warning of the stairway and the subject stairway itself (¶14).

Further, the photographic evidence depicting various angles of the accident location indicates that the stairway was not a dangerous condition. The photographs attached to Silberman's affidavit depict the two signs adjacent to the stairway, which are legible and illuminated by the spotlight above the stairway landing (Reply Aff., Exhibit A). The photographic evidence submitted as exhibits to Reilly's affidavit includes a black and white photograph showing that the stairway landing and hallway leading to the doorway is separated by a black strip (Platek Aff., Ex. E).

Plaintiff's testimony establishes that she walked approximately 30 feet from her table at the restaurant to the bathroom (Platek Aff., Ex D, Deposition of Ann Cronin, at 34:16). Next, Plaintiff testified that,

the last thing I remember was opening the bathroom door to come out and I thought I was going back to where I was sitting. And I just fell down the stairs. I thought I was going back to my right. I just didn't see the stairs.  
(36:13-17).

According to the submitted photographic evidence, affidavits and testimony, upon exiting the bathroom, one must walk through a doorway, then turn left to access the subject stairway. Once through the doorway, the subject stairway is to the left. The doorway only leads to the

stairway. The two signs warning of the stairway are affixed to the wall facing the hallway leading through the doorway.

In response, Plaintiff failed to raise an issue of material fact sufficient to defeat Defendants' motion. First, Plaintiff's testimony is insufficient to rebut Reilly's affidavit and testimony and Silberman's affidavit establishing that the placement of the stairway was not a dangerous condition. Specifically, Plaintiff does not recall the distance from the bathroom to the subject stairway. Plaintiff testified that she did not recall the immediate moments preceding her accident, and importantly, how many steps she took once she exited the bathroom, as she concedes that it is "very hard to quantify how many steps I took because I wasn't counting my steps" (38:7-8).<sup>5</sup> Moreover, Plaintiff did not claim that the stairway itself was defective. Further, Plaintiff's claims that the opened bathroom door guided Plaintiff toward the subject stairway and that the door obstructed her view of the hallway leading to the dining room are unsupported by Plaintiff's testimony.

Plaintiff neither submitted any measurement from the edge of the bathroom door to the stairway, nor rebutted Silberman's measurement of the distance between the bathroom and doorway.

Additionally, the photographic evidence does not contradict the descriptions of the area where Plaintiff's accident occurred as articulated by Reilly and Silberman.

Next,, Plaintiff's claim that the stairway landing was indistinguishable from the hallway and that there was no visual cue notifying here that she was not walking back to the dining room is without merit, since two signs warning of the subject stairway appeared adjacent to the

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<sup>5</sup> Plaintiff's testimony that she looked straight ahead as she exited the bathroom and that she *believes* she took approximately two steps until her accident occurred is insufficient to raise an issue of fact (37:5-6, 20).

stairway (*see Langer v. 116 Lexington Ave., Inc.*, 92 A.D.3d 597, 939 N.Y.S.2d 370 [1st Dept 2012]). Further, the photographic evidence clearly depicts a black strip which distinguishes the hallway leading to the doorway from the stairway landing. Plaintiff's testimony that she did not recall whether any signs or lights in any other area where she was walking after leaving the bathroom is insufficient to raise an issue of fact in this regard (39:24, 41:3-7).

Finally, given the testimony of the presence of lighting, Plaintiff's reliance on her testimony that the lighting in the accident location was inadequate at the time of her accident is insufficient "as a matter of law to raise a triable issue of fact on her claim of inadequate lighting" (*Branham v. Loews Orpheum Cinemas, Inc.*, 31 A.D.3d 319, 325 [1st Dept 2006]).

#### CONCLUSION

Accordingly, it is hereby

**ORDERED** that Defendants, 14 East 47th Pub Inc., Connolly's Pub & Restaurant, Connolly's Bar & Restaurant, 226 Associates, L.L.C.'s motion to dismiss the amended complaint of the Plaintiff pursuant to CPLR 3212, is granted, and the amended complaint is hereby dismissed. It is further

**ORDERED** that the Clerk may enter judgment accordingly. It is further

**ORDERED** that said Defendants shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: June 27, 2017



Hon. Carol Robinson Edmead, J.S.C.