McGill v Polish-American Political Club of Southampton, N.Y., Inc.
2017 NY Slip Op 32469(U)
October 5, 2017
Supreme Court, Suffolk County
Docket Number: 14-6527
Judge: Sanford Neil Berland

[* 1]

SHORT FORM ORDER **INDEX NO.: 14-6527**

SUPREME COURT - STATE OF NEW YORK
PART 6- SUFFOLK COUNTY

PRESENT:
Hon. Sanford Neil Berland, A.J.S.C.

ORIG. RETURN DATE: April 19, 2017
FINAL RETURN DATE: May 30, 2017
MOT. SEQ. #: 002 MD

JUDITH ANN McGILL,

Plaintiff(s),

-against-

THE POLISH-AMERICAN POLITICAL CLUB OF SOUTHAMPTON, NEW YORK, INC. AMERICAN POLISH POLITICAL ASSOCIATION OF SOUTHAMPTON, N.Y., INC., 230 ELM LLC and TIM BURKE PRODUCTIONS, LLC,

Defendant(s).

PLTF'S ATTORNEY:
SIBEN & SIBEN
90 East Main Street
Bay Shore, New York 11706

DEFT'S ATTORNEY:
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Garden City, New York 11530

Upon the reading and filing of the following papers in this matter and the matter having being transferred to the inventory of Honorable Sanford N. Berland on July 26, 2017: (1) Notice of Motion by defendants The Polish American Political Club of Southampton, New York, Inc., American Polish Political Association of Southampton, N.Y., Inc., 230 Elm LLC and Tim Burke Productions, LLC, dated March 13, 2017, and supporting papers; (2) Answering Affidavits made by plaintiff, dated May 10, 2017, and supporting papers; (3) Replying Affidavits made by defendants, dated May17, 2017, and supporting papers; it is,

ORDERED that the motion made by defendants The Polish American Political Club of Southampton, New York, Inc., American Polish Political Association of Southampton, N.Y., Inc., 230 Elm LLC and Tim Burke Productions, LLC, pursuant to CPLR 3212 seeking judgment is hereby denied; and it is further

ORDERED that the parties are directed to appear for a previously scheduled compliance conference on **Tuesday, October 10, 2017 at 9:30 A.M.** in Part 6 located at the Cromarty Court Complex, 210 Center Drive in Riverhead.

Plaintiff Judith Ann McGill (McGill) commenced this action to recover damages for personal injuries allegedly sustained by her in a trip and fall accident that occurred on the night of November 23, 2013 at the Polish American Political Club of Southampton, New York, Inc. (the

Club), a banquet hall located at 230 Elm Street in Southampton. Ms. McGill, who was attending a charitable event in the Club's upstairs banquet room, alleges that she was caused to trip and fall when her foot caught on an electrical cord or wire as she was descending the steps from the banquet room's stage back to the dance floor after helping to draw the winning ticket for the event's "50/50" raffle. Chief among the injuries she claims to have suffered as a result of the accident is a bimalleolar fracture of her right ankle, which required open reduction with internal fixation, kept her out of work for nearly four months and left her with permanent pain, scarring and other sequalae. Named as defendants are the owners of the Club and the commercial entities that provide catering and other event and banquet services there, whom McGill alleges created the dangerous and defective condition that caused her injuries, or knew or should have known of it, but permitted it to exist for an unreasonable length of time without remedying it, warning of it or providing a handrail or other safety device to obviate the danger it posed.

The defendants have denied any liability for McGill's injuries and now move for summary judgment. Their motion is grounded in two broad contentions. The first of these is that McGill does not in fact know what caused her to trip and fall as she was descending the steps from the stage at their premises and that her claim that her foot caught on an electrical cord or wire is after-the-fact speculation on her part. Among other things, they point to the fact that neither McGill herself nor any of the other deponents recalled having observed any cords or wires running down the steps prior to the accident, even though three of those deponents – plaintiff, Dorothy Lewis and Cheryl Atkins – had walked up those same steps shortly before the accident for the raffle drawing; McGill's testimony that she was looking straight ahead, not down, as she descended the steps and when she tripped, and that it was only after she had fallen and looked back toward the steps that she first observed the cord or wire and concluded that that was what had caught her foot; testimony of Lewis to the effect that McGill had subsequently expressed uncertainty to her about the cause of the accident, purportedly saying to Lewis, "I don't know if it was lighting or . . . .", a statement that defendants ask the court to treat as a "binding admission" or, at the very least, as seriously undermining McGill's credibility; Mary Elizabeth Defreese-Weeks' testimony, as representative of the defendants, that there were no wires on the stage that evening because the microphone was wireless, any power cords needed for equipment could be plugged into outlets in the floor of the room behind the stage, any wires extending from the DJs' equipment did not reach down to the stage or steps; and embellishing, and potentially contradictory, details that appear in McGill's affidavit in opposition to the current motion but not in her deposition testimony, which, they say, constitute an attempt to create a feigned issue of fact specifically designed to avoid the consequences of her earlier deposition testimony. Defendants' second contention is that even if McGill was caused to fall as a result of a cord or wire on the steps – the presence of which they dispute – there is no evidence that they either created or had notice of that allegedly defective condition. In support of their motion, they submit, among other things, copies of the pleadings; transcripts of the deposition testimony of the plaintiff, of Defreese-Weeks on behalf of the defendants, and of non-party witnesses Atkins and Lewis, all of whom were present at the event, and photographs of, among other things, the

banquet hall's stage and the area in the social hall where plaintiff fell.

McGill opposes the defendant's motion, disputing their contentions. In support of her position, she submits, among other things, her own affidavit; an affirmation of her attorney; the affidavit of Dorothy Lewis, who avers, *inter alia*, that she also stumbled as she was descending from the stage just ahead of plaintiff; a portion of the defendants' written "proposal" for the event; and several photographs taken in the banquet room during the November 23, 2013 event, as well as incorporating portions of the deposition testimony annexed to the defendants' submission.

On a motion for summary judgment, the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2004]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

To impose liability upon one who owns or was in control of the premises where the plaintiff allegedly was injured, there must be evidence showing the existence of a dangerous or defective condition there that was a proximate cause of the plaintiff's injuries and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time (*see* ***Winder v Executive Cleaning Servs., LLC***, 91 AD3d 865, 936 NYS2d 687[2d Dept 2012]; ***Drago v DeLuccio***, 79 AD3d 966, 913 NYS2d 747 [2d Dept 2010]; ***Penn v Fleet Bank***, 12 AD3d 584, 785 NYS2d 107 [2d Dept 2004]; ***Christopher v New York City Tr. Auth.***, 300 AD2d 336, 752 NYS2d 76 [2d Dept 2002]). These requirements generally apply when the alleged modality of injury is a trip and fall on the defendant's premises: "Ordinarily, a defendant moving for summary judgment in a trip-and-fall case has the burden of establishing that it did not create the hazardous condition that allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it" (*see* ***Goldberg v Village of Mount Kisco***, 125 AD3d 929, 5 NYS3d 149 [2d Dept 2015]; ***Ash v City of New York***, 109 AD3d 854, 855, 972 NYS2d 594 [2d Dept 2013]; ***Mei Xiao Guo v Quong Big Realty Corp.***, 81 AD3d 610, 610–611, 916 NYS2d 155 [2d Dept 2011]). "However, a defendant can make its prima facie showing of entitlement to judgment as a matter of law by establishing that the plaintiff cannot identify the cause of his or her fall without engaging in speculation" (***Ash v City of New York***, *supra* at 855; *see* ***McFadden v 726 Liberty Corp.***, 89 AD3d 1067, 1067, 933 NYS2d 617 [2d Dept 2011]; ***Patrick v Costco Wholesale***

Corp., 77 AD3d 810, 909 NYS2d 543 [2d Dept 2010]). "Where it is just as likely that some other factor, such as a misstep or a loss of balance could have caused a trip and fall accident, any determination by the trier of fact as to causation would be based upon sheer speculation" (***Ash v City of New York***, supra; *see* ***Alabre v. Kings Flatland Car Care Ctr., Inc.***, 84 A.D.3d 1286, 1287, 924 N.Y.S.2d 174; ***Manning v. 6638 18th Ave. Realty Corp.***, 28 A.D.3d 434, 435, 814 N.Y.S.2d 178).

That is not to say that a plaintiff who lacks direct evidence of the exact cause of the trip and fall accident cannot counter a defendant's summary judgment motion and demonstrate that there are material issues of fact through circumstantial evidence. On the contrary, as the Second Department recently noted, "'[T]hat a defective or dangerous condition was the proximate cause of an accident can be established in the absence of direct evidence of causation and may be inferred from the facts and circumstances underlying the injury'" (***Pajovic v 94-06 34th Road Realty Co., LLC,*** 152 AD3d 781 [2d Dept 2017], *quoting* ***Buglione v Spagnoletti***, 123 AD3d 867, 867, 999 NYS2d 453 [2d Dept 2014], and *citing* ***Schneider v Kings Hwy. Hosp. Ctr., Inc.***, 67 NY2d 743, 744–745, 500 NYS2d 95, 490 NE2d 1221).

In ***Pajovic,*** *supra*, the plaintiff was injured when he fell in an interior stairway of defendant's building, which he alleged had been poorly lit. Reversing the grant of summary judgment for the defendant, the Appellate Division held that the defendant had not met its burden "to eliminate triable issues of fact as to whether the alleged inadequate lighting condition for the subject staircase was a proximate cause of the injured plaintiff's fall . . . ." (152 AD3d at 782 (citations omitted)). In the Appellate Division's view, given the circumstances surrounding the accident, a finding that the poor lighting was a proximate cause of the accident, as plaintiff alleged, "would be based on logical inferences, not speculation" (*Id.*). Similarly, in ***Buglione v Spagnoletti***, *supra*, the Second Department held that summary judgment for the defendant was properly denied where, in response to the defendant's prima facie showing that plaintiff "was unable to identify the cause of her accident without engaging in speculation," the plaintiff, in opposition, "raised a triable issue of fact, inter alia, through circumstantial evidence, as to whether the cause of her fall was a cracked and/or unlevel condition on the defendants' driveway" (123 AD3d at 867-68; *see also* ***Dixon v Superior Discounts & Custom Muffle, 118 AD3d 1487*** (4th Dept 2014) (no shifting of burden to identify cause of fall, and summary judgment for defendant reversed, where plaintiff testified that although she could not identify "the precise cause of her fall," she had fallen in "the immediate vicinity of an elevation differential in the pavement").

In the circumstances presented here, plaintiff's sworn assertion, both in her affidavit and at her deposition, that she was caused to fall not by a misstep but by an object that impeded the movement of her right foot as she descended the steps from the stage and that from her vantage point lying on the dance floor after she had fallen, she was able to identify that object as a cord or wire running down the steps, if deemed credible by the trier of fact, is sufficient logically to

support her claim that contact with that cord or wire was a proximate cause of her fall. Although the defendants dispute that there was any cord or wire running down the stage's steps that night, the only testimony proffered by them that directly addresses the condition of the steps in the immediate aftermath of the accident is McGill's testimony that there was a cord or wire running down the steps. If any other observation or inspection of the steps occurred after McGill fell - and Defreese-Weeks testified that there were no photographs taken or report prepared by the defendants that night – it is not reflected in any of the pleadings, testimony or photographs offered by the defendants in support of their motion. Nor, for that matter, do any of the photographs defendants have provided show the condition of the steps at any other time while the event was in progress that night, although two of those photographs – as well as a number of the photographs offered by the plaintiff – do show numerous wires or cables seemingly extending from lighting and other equipment positioned on the stage and from two tripod-mounted speakers positioned in front of the stage. Further, Lewis testified that Christmas lights had been strung under the lip of the stage, including where the steps were positioned that night, and Atkins recalled that "flashlights" were on the floor in front of the stage and that the lighting during the event was "dim" as she descended the steps, although she testified that she "could see coming down."

On a motion for summary judgment, the court cannot determine credibility (***Vega v Restani Construction Corp.***, 18 NY3d 499, 505 [2012]; ***Ferrante v American Lung Association***, 90 NY2d 623 [1997]). Moreover, the "facts must be viewed 'in the light most favorable to the non-moving party'" (***Vega v Restani Construction Corp.,*** *supra* at 503, *quoting Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). In the circumstances presented here, and on the current state of the record, it would be impossible to dismiss as speculative, and not "based on logical inferences," ***Pajovic v 94-06 34th Road Realty Co., LLC,*** *supra,* a finding that it was the electrical cord or wire that plaintiff testified she saw, seconds after the accident, running down the steps from the stage, that had impeded the movement of her right foot and was a proximate cause of her fall and resulting injuries. Thus, in light of the conflicting proof offered by the defendants, on the one hand, and the plaintiff, on the other, there is an issue of fact as to the proximate cause of plaintiff's fall. While contradictory or inconsistent statements and embellishments allegedly made by plaintiff may, in the trier of facts' view, bear on the credibility or weight of her testimony, those statements would not in and of themselves deprive the inference of its logical underpinning if her testimony is nonetheless believed.

Likewise, defendants' second contention - that there is no evidence that they, as opposed to the non-party DJs for the event, created or had knowledge of the defective condition that allegedly caused plaintiff's injury – is not sufficiently supported to demonstrate that they are entitled to judgment as a matter of law. On the contrary, Defreese-Weeks testified that the defendant Club owns the building in which the event took place and that defendant Tim Burke Productions, LLC leases the building from the Club and owns 230 Elm LLC. It appears from her testimony that events at the Club are conducted by Tim Burke Productions, LLC and/or 230 Elm

LLC, which, among other things, are responsible for event set up – including the event plaintiff was attending when she fell – and employ a setup crew. According to Defreese-Weeks, although the DJs set up their own equipment, the stage is the property of and set up by Tim Burke Productions, LLC or 230 Elm LLC, and when wiring to the stage is required (Defreese-Weeks testified that none was the night of the event McGill attended), the setup crew is responsible for taping down any electrical wires running to the stage (which would, in any case, according to Defreese-Weeks, have been at the opposite end of the stage from the steps McGill, Atkins and Lewis used). Further, although there was testimony indicating that one or more of the three DJs who provided the music for event donated his services that night – and which, apart from the number of "donated" DJs, is not inconsistent with a largely illegible page from the 230 Elm's proposal for the event, annexed to plaintiff's submission, that appears to indicate that one DJ was "to donate himself" – Defreese-Weeks testified that the proposal for the event called, among other things, for two DJs to be provided, seemingly by 230 Elm LLC or Tim Burke Productions, LLC, as part of their overall contractual arrangement with the charity, Our future Generation, for the event. Given these many factual uncertainties, which Defreese-Weeks' cursory testimony on the subject does nothing to dispel, including the lack of clarity with respect to the exact nature of the relationships among the four defendants and their respective roles with respect to the maintenance and operation of the facility and the conducting of events there, including, but by no means limited to, the engagement of DJs for parties, it is impossible to conclude on the current record that the defendants have met their respective burdens "of establishing that [they] did not create the hazardous condition that allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it" *(see* ***Goldberg v Village of Mount Kisco***, *supra*, 125 AD3d 929, 5 NYS3d 149 [2d Dept 2015]; ***Ash v City of New York***, *supra*, 109 AD3d 854, 855, 972 NYS2d 594 [2d Dept 2013]; ***Mei Xiao Guo v Quong Big Realty Corp.***, *supra*, 81 AD3d 610, 610–611, 916 NYS2d 155 [2d Dept 2011]).

Accordingly, defendants' motion is denied. The parties are directed to appear for a status conference on Tuesday, October 10, 2017.

Dated: 10/5/2017
Riverhead, New York

HON. SANFORD NEIL BERLAND, A.J.S.C.

____ **FINAL DISPOSITION** __XX__ **NON-FINAL DISPOSITION**