SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

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JOHN MOERS III and DEBRA MOERS,

Index No. 152026/13

Plaintiffs,

-against-

MANSION REALTY II, LLC and LIMELIGHT PUB LLC d/b/a CROSSBAR at LIMELIGHT MARKETPLACE,

Defendants.

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JENNIFER G. SCHECTER, J.:

Motion sequence numbers 04 and 05 are consolidated for disposition. Defendants Mansion Realty II, LLC (Mansion) and Limelight Pub LLC d/b/a Crossbar at Limelight (Crossbar) move for summary judgment in this premises-liability personal injury action. Mansion also moves for conditional summary judgment on its common-law cross claim for indemnification from Crossbar. Plaintiffs John Moers III (Moers) and Debra Moers oppose the motions.

Background

This action arises from an accident at Crossbar restaurant on December 14, 2011 at 7:30 PM when Moers tripped on an outside step, fell and then caught his finger in entrance doors to the restaurant.

The Leases

Mansion owns the property located at 47 West 20th Street in Manhattan (Building). There is a lease agreement (Lease) between Mansion, as landlord, and Limelight Retail, LLC, operating under the trade name Limelight Marketplace, as

tenant (Affirmation in Support of Motion Sequence Number 04 [Supp 04], Ex I). There is a sublease agreement (Sublease) between Magjic I, LLC, doing business as Limelight Marketplace, as landlord, and Crossbar, as tenant (Affirmation in Support of Motion Sequence 05 [Supp 05, Ex H] [Sublease]). Crossbar operates a restaurant at the premises.

The Sublease

The premises is described in the Sublease as "Space number 85 for an approximate square foot area of 525" as measured from the outside exterior walls and from the center interior walls at 47 West 20th Street (Sublease at §§ 1.01, 2.01).

The Sublease states that the tenant "shall be responsible for the maintenance and repair of the Premises and to all fixtures and equipment therein or appurtenant thereto" except that the landlord is responsible for structural repairs not caused by the tenant (Sublease at § 7.01).

Sections 2.01 (b) and (c) provide that nothing in the Sublease "shall be construed as a grant of rental of (and Demised Premises shall not include) . . . any right in . . . exterior of the building . . .[on] the land upon which the Demised Premises is located" and that common areas are "subject to the exclusive control and management . . . by Landlord and Landlord shall have the absolute right to modify

[or] change . . . the common areas and the improvements thereto . . ." (Sublease at § 2.01 [b],[c]).

The Sublease further sets forth that the "Landlord may, at any reasonable time or times, upon prior notice to Tenant (except in the event of an emergency, in which event no notice shall be required), enter upon the Premises for the purpose of: [a] inspecting the same; [b] making such repairs, replacements or alterations which Landlord may be required to perform . . . or which it may deem desirable for the Premises . . ." (Sublease at § 7.02).

Moers Deposition

Moers testified that his accident took place on Wednesday, December 14, 2011, at approximately 7:30 PM at the Limelight Marketplace at Crossbar restaurant (Affirmation in Support of Motion Sequence Number 05 [Supp 5], Ex J [Tr Moers] at 13). He was stopping by the restaurant to get a drink and had been there three to 10 times in the past (*id.* at 14-15). When approaching the entrance area outside of the restaurant, there is a small step onto a platform and then another step leading to an upper platform and then a small lift to get to the doors (*id.* at 19-20; Supp 5, Ex K). Moers described the lighting by the entrance to the restaurant as "[t]errible, very dark" (Tr Moers 15-16). Moers, recounted that he was looking at the ground and the door and did not actually step

onto the second step; rather, his foot caught the step while he was walking and he tripped (*id.* at 20-21). He stated that the step was not mis-leveled and did not have any cracks (*id.* at 22). He did not see the step, one of his feet caught the step as he was walking and he tripped forward (*id.* at 22). He crashed into the doors of the restaurant when he fell and his left index finger got lodged between the front doors (*id.* at 23-24, 95-97). After the accident, when he looked at the door he noticed that there was a space in between the doors but he could not remember how much space (*id.* at 101, 104).

He explained that when he had been to the restaurant in the past, he never had difficulty seeing the step or walking up the steps (Moers Tr at 38, 80-81). He thinks that the lighting conditions on the day of the accident were the same as on his prior visits (*id.* at 82). His wife tripped on the step once and he believed that they said something to the restaurant but did not recall any details (*id.* at 38-39, Supp 5, Ex L [Transcript of Debra Moers Deposition] at 23, 29 [Ms. Moers testified that she had complained to the bartender that the step was dangerous because she had tripped]).

Horvath Deposition

Daniel Horvath was the General Manager of Crossbar at the time of the accident and filled out the incident report (Supp 5, Ex N [Horvath Tr] at 13, 23). He recalled being in his

office when the bartender called and notified him that a gentleman tripped up the stairs and jammed his finger in the door. He came down and spoke with Moers who told him that he tripped, landed on the door and that his finger went in between the two doors and that "his body weight then closed the door on his finger" (*id.* at 25-26). Moers did not indicate the reason he tripped (*id.* at 27).

After Moers was taken to the hospital, Mr. Horvath inspected the stairs and the doors and observed nothing out of the ordinary (Horvath Tr at 28). He did not remember the doors to be self-closing (*id.* at 28). To the best of his recollection, there were outdoor lights on either side of the door and street lights (*id.* at 29). Mr. Horvath gave no opinion on whether it was dark or light in the accident area (*id.*). He was never made aware of any outdoor lighting issues, stair issues, door issues or building violations (*id.* at 35-36, 51, 57). Generally, when there was a light out inside, he would change it himself and if there were a structural issue, he would report it to the Building's management (*id.* at 31, 35). Other than the Moers incident, Mr. Horvath was unaware of any patrons being injured at the premises (*id.* at 16).

Experts

In opposition to defendants' motions, plaintiff submits the affidavit of Stanley Fein,P.E. an engineering consultant (Opposition to Motion Sequence Number 05 [Opp], Ex F [Fein Aff]). Mr. Fein visited the location of the accident on September 13, 2016 and read the "relevant portions" of the transcripts of the depositions of Mr. Horvath and Moers (*id.* at ¶ 4). He concludes that the premises did not have a Certificate of Occupancy in violation of the Building Code and that the accident was caused by the negligence of the owner because the Building was maintained in a dangerous and hazardous condition (*id.* at ¶¶ 4-5). He further observed violations of the 2008 Building Code including an improper door, lack of handrails, an un-leveled landing, stairs with varying rise heights and inadequate lighting but he did not specify any measurements to support his findings.

In response, defendants submitted the affidavit of Bernard P. Lorenz, P.E. (Affirmation in Reply to Motion Sequence 05 [Reply 05], Ex A [Lorenz Aff]). Mr. Lorenz visited the premises in January 2017 (*id.* at ¶ 1). He reviewed the Department Of Buildings Information System and submits that although there is no Certificate of Occupancy, there is a Letter of No Objection from 2010 approving the establishment for eating and drinking on the first floor along

with a 1990 approved application for new kitchen equipment in an existing kitchen (*id.* at ¶ 6). He asserts that there was no need for a new Certificate of Occupancy, that the 1968 Building Code applies to the Building--not the 2008 Building Code that Mr. Fein relies on--and that the alleged violations do not apply to Crossbar (*id.* at ¶ 7[D]; Affirmation in Reply 04 [Reply 04] at ¶¶ 10-12). Mr. Lorenz found no evidence that the Building was not properly maintained, no hazard in the elevation between the threshold extension and the platform and nothing to substantiate Mr. Fein's claims of insufficient lighting (Lorenz Aff at ¶ 7[E-G]).

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. "Where the moving party fails to meet this burden, summary judgment cannot be granted, and the non-moving party bears no burden to otherwise persuade the Court against

summary judgment. Indeed, the moving party's failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*). It is only if the movant has met its heavy burden that 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 failed to meet their heavy burden. At a minimum, and regardless of which Building Code applies, defendants failed to establish that they kept the outdoor entrance area in a reasonably safe condition. "Whenever the general public is invited into stores, office buildings and other places of public assembly, the owner is charged with the duty of providing the public with a reasonably safe premises, including a safe means of ingress and egress. In general, [the owner's] duty is to use reasonable care at all times and in all circumstances" (*Gallagher v St. Raymond's Roman Catholic Church*, 21 NY2d 554 at 557 [1968]). And, although "it is usually stated that the occupier of the land is not the insurer of the safety of those who enter with its permission, [the] 'obligation of reasonable care is a full one'. Thus, while it is not enough for a plaintiff merely to show that danger existed, if he demonstrates that the defect which

caused . . . harm was of such character or duration that a jury could reasonably conclude that due care would have uncovered it, recovery may be had against the occupier of the land" (*Putnam v Stout*, 38 NY2d 607, 611-12 [1976]).

Significantly, defendants have not demonstrated that the step was not inherently dangerous absent adequate lighting or a sufficient warning (*see Haibi v 790 Riverside Drive Owners, Inc.*, 156 AD3d 144 [1st Dept 2017][inadequate lighting itself may constitute a dangerous condition]; *Lee v New York City Tr. Auth.*, 138 AD3d 579, 579 [1st Dept 2016]; *Rachlin v 34th Street Partnership, Inc.*, 96 AD3d 690 [1st Dept 2012] [defendant failed to offer evidence on lighting conditions]; *Amador v City of New York*, 96 AD3d 475, 475-476 [1st Dept 2012]; *see also Grazidei v Mezeny Inc.*, 26 Misc 3d 1221[A] [Sup Ct, Kings County 2010][in the absence of a warning, defendant must demonstrate as a matter of law that the condition was both open and obvious and not unreasonably dangerous]; *Miner v Northport Yacht Club*, 15 AD3d 362 [2d Dept 2005]; *contrast Remes v 513 West 26th Realty, LLC*, 73 AD3d 665 [1st Dept 2010] [summary judgment granted where photographs showed obvious drop in elevation, that trimmings outlined the steps and that bright lights illuminated the stairway]).

Nor have they established that they neither created nor had notice of the alleged inadequate lighting (*Lee*, 138 AD3d

at 579; *Rodriguez v Board of Educ. of the City of N.Y.*, 107 AD3d 651, 651-652 [1st Dept 2013]; *Rachlin*, 96 AD3d at 691; *Amador*, 96 AD3d at 476).

Plaintiff testified that the lighting at the entrance to the restaurant was "[t]errible, very dark." Defendants explain that there were no prior incidents or complaints about the adequacy of the lighting. However, Ms. Moers herself tripped in the past and testified that she complained about the step to a bartender in the year before Mr. Moers' incident. There was no testimony or evidence moreover establishing sufficient lighting of the entry path leading to Crossbar at Limelight Marketplace.* The adequacy of the lighting is necessarily implicated in any inquiry as to whether the step was open and obvious and not inherently dangerous. In addition, there was no indication of whether there were any cues that would minimize or negate any danger at the time of the accident. Because defendants have a duty of reasonable care and could be found responsible, defendants' motions for summary judgment are denied (*Putnam v Stout*, 38 NY2d 607 at 611-12 [1976]; *Peralta v Henriquez*, 100 NY2d 139 [2003][defendant's creation of a dangerous condition may relieve a plaintiff from having to prove notice of the

*There was evidence of lighting in other areas including a street light, lights illuminating the Building, lights illuminating the shrubbery and lights by the garbage area.

condition; jury should have been asked to determine if defendants knew or should have known existing lighting was not adequate]; *Gallagher*, 21 NY2d at 557-58 [exterior of building should be lit during the times it is open to the public because the public is entitled to safe and reasonable means to enter and exit a building, which is a simple precaution that comes at a low cost to the owner]).

Mansion additionally urges entitlement to summary judgment because it was an out of possession landlord and bore no responsibility for the repairs or maintenance of the premises. As Mansion not only retained the right of re-entry, but also agreed to maintain the Building and was in control of the common areas, liability may be imposed, because it has not sufficiently established that it was an out of possession landlord that had no responsibility over the outside area where the accident took place (*Helena v 300 Park Ave., LLC*, 306 AD2d 170 at 171 [1st Dept 2003]; *Elsayed v Al Farah Corp.*, 132 AD3d 942 [2d Dept 2015] [owner failed to establish that it was out of possession and that the condition was open and obvious and not inherently dangerous]; Sublease at §§ 2.01[b] and [c], 7.01, 7.02).

Mansion's argument that it is entitled to conditional summary judgment against Crossbar for common law

indemnification because Crossbar was the active tortfeasor is denied based on the analysis (Supp 04 at ¶¶ 30, 47-49).

Accordingly, it is ORDERED that motions for summary judgment by Mansion Realty II, LLC and Limelight Pub LLC d/b/a Crossbar are denied.

This is the decision and order of the court.

Dated: March 16, 2018

HON. JENNIFER G. SCHECTER