

<b>Uppstrom v Peter Dillon's Pub</b>
2018 NY Slip Op 30651(U)
April 11, 2018
Supreme Court, New York County
Docket Number: 153180/14
Judge: Jennifer G. Schechter
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NYSCEF DOC. NO. 78  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 57  
-----x  
CHANTAL UPPSTROM,

RECEIVED NYSCEF: 04/12/2018  
  
Index No. 153180/14

Plaintiff,

-against-

PETER DILLON'S PUB and  
353 LEXINGTON AVENUE, LLC,  
Defendants.  
-----x  
JENNIFER G. SCHECTER, J.:

Defendant 353 Lexington Avenue, LLC (Owner) moves for summary judgment dismissing the action commenced by plaintiff Chantal Uppstrom (Uppstrom) and for summary judgment on its cross-claims for indemnification and defense against defendant Peter Dillon's Pub (Pub). The motion is granted.

Background

This action stems from an accident at the Pub on February 15, 2013 (Affirmation in Support [Supp], Ex D at #6). Uppstrom alleges that she was walking to the restroom on the Pub's lower level when she tripped and fell down the "steep, narrow, misleveled and poorly lit stairs. There were no 'warning signs' advising the customers of the dangerous and hazardous condition of the stairs and illegal and missing handrails" (Supp, Ex D at #8). Uppstrom also alleges violations of the New York City Building Code and negligence in serving alcohol to an intoxicated person (Supp, Ex D).

Owner owns the property where the Pub is located (Building). Hilson Management (Hilson) manages the Building (Supp, Ex H). Owner leased a portion of the Building (Premises) to DES Restaurant Associates to operate Peter Dillon's Pub (Supp, Ex J).

There is a lease agreement (Lease), rider (Rider) and extension of Lease between Owner and Pub. The Lease provides:

"4. Repairs: . . . [Pub shall] . . .make all non-structural repairs . . .

"8. [Pub] agrees . . . to maintain general public liability insurance in standard form in favor of Owner and [Pub] against claims for bodily injury . . . occurring in or upon the demised premises . . . [Pub] shall indemnify and save harmless Owner against and from all liabilities, obligations, damages penalties, claims, costs and expenses for which Owner shall not be reimbursed by insurance, including reasonable attorneys' fees, paid suffered or incurred as a result of any breach by [Pub] . . . [Pub], upon written notice from Owner, will, at [Pub's] expense, resist or defend such action or proceeding . . .

"13. Owner or Owner's agents shall have the right (but shall not be obligated) to enter the [Premises] in any emergency at any time, and at other reasonable times to examine the same and to make such repairs, replacements and improvements . . . following [Pub's] failure to make repairs or perform any work which [Pub] is obligated to perform under this lease, or for the purpose of complying with laws . . ."

(Supp, Ex J at ¶¶ 4, 8 and 13).

The Rider provides that the Pub shall maintain general liability insurance in the amount of \$3,000,000.00 and that it

agrees to indemnify Owner from all claims, losses, damages or expenses including attorneys' fees in connection with:

"any injury to person . . . sustained in or about the Premises . . . except such claim found to be the result of the negligence of the [Owner]. . . [Pub] shall, at its own cost and expense, defend any and all actions . . . and [Pub] shall pay, all judgments . . . The comprehensive general liability coverage maintained by [Pub] pursuant to this Lease shall specifically insure the contractual obligations of [Pub]"

60. AS-IS POSSESSION. . . . [Owner] shall not be obligated to perform any work or make any repairs, alterations, improvements in additions to said Premises for [Pub's] occupancy.  
(Supp, Ex K at ¶¶ 49[A], [B] [iv], 60 ).

Uppstrom Deposition

Uppstrom's accident took place on Friday, February 15, 2013, at approximately 4:00 PM at the Pub (Supp, Ex G [Tr Uppstrom] at 12, 17). Uppstrom and her friends had ordered drinks and had a couple of shots (Tr Uppstrom at 24-26). Uppstrom testified that she was "not drunk by any means" (Tr Uppstrom at 24-26, 44-45). Subsequently, Uppstrom was directed by her friends toward the back of the Pub to use the restroom (Tr Uppstrom at 27-28). As she proceeded, "[t]here was a wall and [she] went to turn around the wall and this is when [she] stepped down the first stair and tried to grab for a handrail and there was nothing there. That's when [she] fell" (Tr Uppstrom at 28). "[She] felt like [she] slipped

down the first step . . . From the initial landing down to the first step" (Tr Uppstrom at 31). She tried to reach for a handrail with her right hand (Tr Uppstrom at 33). "[She doesn't] know exactly how it happened" (Tr Uppstrom at 32). The lighting was dim but she could see things on the wall (*id.*). Uppstrom did not see and does not know if there was a sign above the steps on the day of the accident (Tr Uppstrom at 30, Supp, Ex H at 1).

Dillon Deposition

Desmond Dillon owns the Pub (Supp, Ex I [Tr Dillon] at 7). At the time of the accident, the main floor of the Pub had tables and chairs and the basement contained restrooms and a storage area (Tr Dillon at 12). From the inception of the lease, a staircase provided Pub patrons with access from the main floor to the restrooms. Since at least 2007, there has been a sign over the staircase that reads "Stairs Please Use Caution" (Tr Dillon at 29-30, Supp at ¶ 26, Exs H, M at 43-44). Along the staircase, there is a handrail on the left side of the steps going down and a handrail on the right side that starts below the top step because there is a ledge (Tr Dillon at 26). The Pub did not make any repair requests or complaints to Owner about the steps nor is it aware of any violations issued for the staircase (Tr Dillon at 59-60, 65).

Schwalbe Deposition

James Schwalbe is a Hilson employee responsible for handling legal matters (Supp, Ex N [Tr Schwalbe] at 9-10). Schwalbe swears that neither Hilson nor Owner were involved in the business operations of the Pub or would have any knowledge about how much alcohol was served (Supp, Ex O at ¶¶ 4-6).

Expert Reports

The parties exchanged expert reports.

Plaintiff's expert, Nicholas Bellizzi, P.E., explained that "[t]he New York City Building Code (NYBC) contains several requirements that are pertinent to the subject step accident location" (Supp, Ex P [Bellizzi Report] at 5). Bellizzi pointed out that section 27-375(f) of the NYBC requires that stairs, such as the ones at the Pub, have a handrail on one side only and a finger clearance of one and one-half inches (Bellizzi Report at 5-6 [emphasis added]). Bellizzi opined that "Uppstrom was not afforded with a proper handhold . . ." and that a "handrail on the right side would have provided both a handhold grasp . . . and a visual cue that there was a stairway located around the corner of the archway. Basically the stairway was hidden from view and was a trap and snare" (Bellizzi Report at 7).

Owner's expert, James Bermudez, P.E., focused his analysis on the top half of the stairs because that is where Upstrom's accident occurred (Supp, Ex Q [Bermudez Report] at 3). He explained that there was a code violation with respect to the finger clearance on the handrail by the third step because of an interfering hanging picture frame (Bermudez Report at 4). He opined that the stairway's presence is evident "because of the channeling effect of the interior walls, the difference in light intensity and the presence of warning signs . . . It is also evident that the only alternative to a pedestrian is to turn left, precisely as the plaintiff testified that she did" (Bermudez Report at 4). Bermudez further set forth that the light intensity readings indicated that the lighting at the top of the landing was adequate (Bermudez Report at 4, Ex C).

Bermudez's measurements were consistent with Bellizzi's measurements. However, Bermudez concluded "given the facts of the case, wherein [Upstrom testified] that she never stepped down to the third tread, it is highly unlikely that [the handrail finger clearance violation] was casually linked to the fall. In fact, the condition is on the opposite side (her left side) of the stairway wall to where she testified she reached" (Bermudez Report at 5). Bermudez concluded that it

is not possible with any degree of engineering certainty to find a causal link between the condition of the stairs and stairway and "and the plaintiff's stated mechanism of fall" (Bermudez Report at 6).

This Motion

Owner moves for summary judgment, urging that, as a matter of law, there was no negligence related to the Premises that caused Upstrom's fall and that it is entitled to indemnification.

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. Once the movant has made this showing, 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]).

Negligence

Owner established that there was no negligence related to the Premises that caused Upstrom's fall. It is undisputed, indeed all of the experts agree, that the stairs were only required to have one railing and there was one railing.\* The finger-width violation, which Owner acknowledges, was not the proximate cause of plaintiff's fall because Upstrom testified that she reached to her right where there was no handrail and none was required (Upstrom Tr 27-30; NYBC 27-375[f]; *Ridolfi v Williams*, 49 AD3d 295 [1st Dept 2008] [handrail-related building code violation was not proximate cause of slip and fall]).

Upstrom failed to rebut Owner's showing of entitlement to judgment. Significantly, she failed to demonstrate that any potential Building Code violation or unsafe condition caused her accident. There is no evidence, moreover, that the stairs were a "trap and snare." Bellizzi's statement to that effect is conclusory and unsupported. Plaintiff did not

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\* The expert reports have only been considered to assess whether plaintiff could demonstrate that there was a defective condition that was the proximate cause of her injury (see *Spierer v Bloomingdale's*, 43 AD3d 664, 665 [1st Dept 2007]).

testify to any confusion or surprise when she reached the stairs. The evidence additionally established that the stairs were sufficiently illuminated (Tr Uppstrom at 32) and that there was a cautionary sign. Plaintiff did not dispute that there was a sign nor did she dispute that the pictures depicting signage were accurate (Tr Dillon at 29-30, Supp, Ex H; Supp at ¶ 26, Ex M at 43-44). She merely testified that she did not recall a sign (Uppstrom Tr at 30; *Sato v Ippudo NY*, 104 AD3d 423 [1st Dept 2003]).

Uppstrom's claim that defendants were negligent in serving alcohol to an intoxicated person is belied by her own testimony that she was "not drunk by any means" (Tr Uppstrom at 24-26, 44-45).

Because in response to Owner's showing, plaintiff has not demonstrated that any improper structural or safety condition was the proximate cause of her fall, Owner's summary judgment motion is granted as to plaintiff (*Vazquez v Takara Condominium*, 145 AD3d 627 [1st Dept 2016]).

For the same reasons, after searching the record, the negligence cause of action, which is the subject of Owner's motion, is dismissed as against Pub as well (see CPLR 3212[b]; see *Guerriero v Jand*, 57 AD3d 365 [1st Dept 2008]; *Montalvo v J. Petrocelli Const., Inc.*, 8 AD3d 173, 175-76 [1st

Dept 2004]; *Canning v Barney's New York*, 289 AD2d 32, 35 [1st Dept 2001]).

Indemnification

Because Owner was not negligent, under the terms of the Lease and Rider it is entitled to contractual indemnification for losses that it actually incurred. Summary judgment is granted as to liability on Owner's cross-claim for contractual indemnification. The parties are to proceed to trial on damages, if any, on the cross-claim.

Accordingly, it is

ORDERED that the motion by defendant 353 Lexington Avenue, LLC for summary judgment against Chantal Upstrom is granted and it is ADJUDGED that the complaint is dismissed against it with costs and the Clerk is to enter judgment accordingly; it is further

ORDERED that the motion by defendant 353 Lexington Avenue for summary judgment on its cross-claim for contractual indemnification is granted to the extent that it is awarded a judgment on liability against Peter Dillon's Pub and the parties to the cross-claim are to proceed to a trial on damages if any; and it is further

ORDERED and ADJUDGED that pursuant to CPLR 3212(b) summary judgment is awarded in favor of Peter Dillon's Pub and

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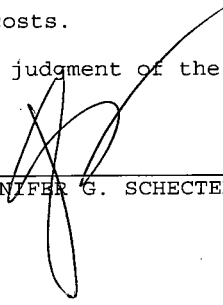
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against Chantal Uppstrom on the complaint and the clerk is to enter judgment accordingly without costs.

This is the decision, order and judgment of the court.

Dated: April 11, 2018



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HON. JENNIFER G. SCHECTER