

Pushkine v Hillstone Rest. Group, Inc.

2018 NY Slip Op 32016(U)

August 17, 2018

Supreme Court, New York County

Docket Number: 151787/2016

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2

Justice

INDEX NO. 151787/2016

TANYA PUSHKINE,

Plaintiff,

MOTION SEQ. NO. 001

- v -

HILLSTONE RESTAURANT GROUP, INC.,

Defendant.

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, 33, 34, 35, 36, 37

were read on this motion to/for

SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that the motion is granted.

In this personal injury action commenced by plaintiff Tanya Pushkine, defendant Hillstone Restaurant Group, Inc. moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion, which is opposed by plaintiff, is granted.

FACTUAL AND PROCEDURAL BACKGROUND:

On August 10, 2015 at approximately 1:40 p.m., plaintiff was allegedly injured when she slipped and fell at the Hillstone Restaurant ("the restaurant") operated by defendant at 53rd Street and Lexington Avenue in Manhattan. Doc. 14, at par. 6.1 Plaintiff was at the restaurant that day

1 All references are to the documents filed with NYSCEF in this matter.

to have lunch with two friends.² Plaintiff was seated at a booth with leather “bench-like” seats. Doc. 17, at p. 22-23. When she was shown to her table, plaintiff noticed that, since the floor under the booth (“the platform”) was 6-7 inches off the ground, she had to step up in order to sit down. Doc. 17, at p. 24-25, 27, 32. She described this as “a natural step.” Doc. 17, at p. 24. The table where plaintiff sat had no sign indicating that there was a step, although other tables at the restaurant had such signs. Doc. 17, at p. 31-32.

Plaintiff initially testified that, at the time she was seated at her table, she noticed that the platform and the floor of the restaurant were made from different materials: the floor of the restaurant was carpeted and she believed that the platform was concrete. Doc. 17, at p. 25. Later, however, plaintiff represented that she did not notice that the floor of the restaurant and the platform were made from different materials until she saw photographs taken by her expert, which confirmed that the surfaces were indeed different. Doc. 17, at p. 26-28.

Plaintiff did not notice a difference in the color of the restaurant floor and the color of the platform until she went to see the site with her attorney. Doc. 17, at p. 40. She maintained that the both surfaces were “very dark” in color. Doc. 17, at p. 40. She stated that the platform was black and that the floor of the restaurant was checkered with some black in it. Doc. 17, at p. 40-41.

After plaintiff’s friend paid the bill for lunch, plaintiff left the table to use the bathroom, at which time she stepped down from the booth onto the floor of the restaurant. Doc. 17, at p. 21, 43. When she returned to the table from the bathroom, she traversed the step for the third time that day. Doc. 17, at p. 44.

² Although plaintiff alleged in her complaint that the incident occurred on August 10, 2015, she testified at her deposition that it occurred on August 7, 2015. Doc. 17, at p. 8.

Plaintiff maintained that, minutes before the accident occurred, her view of the step was obstructed by “darkness” and “no light.” Doc. 17, at p. 45. At the time of the incident, she turned towards the end of the bench, took a step off the platform, and fell. Doc. 17, at p. 46-48. She admitted that she did not remember that there was a step there. Doc. 17, at p. 49-50. In an affidavit in opposition to the instant motion, plaintiff states that she “was looking straight ahead” when she fell and that “the lighting was dim.” Doc. 35.

Michelle Willison, executive general manager of Hillstone Restaurant Group, testified at a deposition on behalf of defendant. She began working at the subject restaurant in October of 2016, after plaintiff’s accident. Doc. 18, at p. 9. She did not visit the restaurant between 2007 and the time she began working there. Doc. 18, at p. 10. Of the 39 tables at the restaurant, 9 had a step used to enter the booth. Doc. 18, at p. 21. Six of those tables had signs warning that there was a step. Doc. 18, at p. 21. She was not sure whether all of the steps were the same height. Doc. 18, at p. 22. The steps were made of concrete and were gray. Doc. 18, at p. 22-23. During the three years prior to plaintiff’s accident, defendant never received any complaints about the steps at the tables. Doc. 18, at p. 26. According to Willison, all of the tables had theater-style lighting which illuminated the table as well as the area slightly past the table. Doc. 18, at p. 23, 34.

Nicole Blum, one of the friends who had lunch with plaintiff on the date of the alleged incident, appeared for a non-party deposition. Doc. 19. Blum confirmed that one had to take a step up to access the booth where they ate. Doc. 19, at p. 10, 14, 22. The step was about 6 inches high. Doc. 19, at p. 23. Right after the alleged incident, plaintiff told Blum “I missed the step. I just fell” and also said “I just missed it.” Doc. 19, at p. 24-25. Blum did not see exactly how plaintiff fell. Doc. 19, at p. 31-33.

LEGAL CONCLUSIONS:

A party moving for summary judgment has the burden of establishing its entitlement to such relief as a matter of law by demonstrating the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes its *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." *Id.*

"A landowner has a duty to maintain its 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." *Branham v. Loews Orpheum Cinemas, Inc.*, 31 A.D.3d 319, 322 (1st Dept 2006). However, a landowner is not liable for a plaintiff's injuries where the condition complained of was open, obvious and not inherently dangerous. *Gonzalez v. Mount Vernon Neighborhood Health Center, Inc.*, 135 A.D.3d 618, 618 (1st Dept 2016); *Villanti v. BJ's Wholesale Club, Inc.*, 106 A.D.3d 556, 557 (1st Dept 2013).

Defendant has established its *prima facie* entitlement to summary judgment dismissing plaintiff's complaint by submitting evidence that the elevation difference between the platform and the floor of the restaurant was open, obvious and not inherently dangerous. Defendant's expert, registered architect Edward D. Re, Jr., states in his affidavit in support of the motion, inter alia, that he inspected the area where the alleged incident occurred and concluded that it was "correctly designed, constructed and maintained." Doc. 23, at par. 10-12. He added that the design of the

platform and booth was: 1) “standard in the restaurant and dining industry”; 2) meant to render it “physically impossible to continue walking and trip over the platform because the permanently affixed table purposely overhangs the bench seat”; and 3) intended to provide a visual cue to a diner that he or she was seated at a raised platform. Doc. 23, at pars. 13-17.

Re further stated that, since the platform was made of cement and painted black, and the floor of the restaurant was carpeted and covered with a lighter colored pattern, a patron would have seen differences in the textures and colors of those areas. Doc. 23, at par. 21. Additionally, Re said that the New York City Department of Buildings approved the plans submitted for the construction of the restaurant, which are submitted in support of the motion. Doc. 22; Doc. 23, at par. 22. Re also noted that the lighting in the area was adequate, that the step and the lighting did not violate any Building Code provisions and that, although plaintiff’s expert, Stanley Fein, P.E. asserted that defendant violated section F1637-95 of the American Society of Testing and Materials, that provision was inapplicable herein. Doc. 23, at pars. 19, 23-24.

Willison testified that all of the tables in the restaurant had theater-style lighting which illuminated each table, as well as the area slightly past the table. Doc. 18, at p. 23, 34. She further stated that defendant never received any complaints about the steps at the tables during the three years prior to plaintiff’s accident. Doc. 18, at p. 26.

Plaintiff’s opposition to the motion does not raise a triable issue of fact. Her argument that the difference in height between the floor of the restaurant and the platform at issue presented a trap-like danger, and therefore raised an issue of fact regarding whether the said condition was not open and obvious, is without merit. Although a visible step is generally not inherently dangerous, “a step may be dangerous where the conditions create ‘optical confusion’ — the illusion of a flat

surface, visually obscuring the step." Langer v. 116 Lexington Ave., Inc., 92 A.D.3d 597, 599, 939 N.Y.S.2d 370 (1st Dept 2012). Where such optical confusion exists, "[f]indings of liability have typically turned on factors, such as inadequate warning of the drop, coupled with poor lighting, inadequate demarcation between raised and lowered areas, or some other distraction or similar dangerous condition." *Id.* (internal citations and quotations omitted). In *Langer*, the Appellate Division, First Department held that a single step leading into a banquet room did not create optical confusion, reasoning that plaintiff testified that she did not see the step because she was looking straight ahead while walking into the banquet room, thereby establishing that she was not watching where she was walking. *Langer*, 92 A.D.3d at 599-600.

Here, as in *Langer*, plaintiff also represents that she was looking straight ahead at the time she fell. Doc. 35, at par. 4. Thus, the same logic applies and this Court concludes that plaintiff missed the step not because there was any optical confusion, but because she did not watch where she was walking. "Plaintiff's [affidavit and] testimony as to the darkness is too vague" to create an issue of fact since she did not testify that "her foot missed the step because she was unable to see it." *Richards v Kahn's Realty Corp.*, 114 AD3d 475, 475 (1st Dept 2014).³ This conclusion is supported by the testimony of Blum, who recalled that, after the incident, plaintiff admitted that she fell because she missed a step.

Since plaintiff concededly traversed the step without incident three times prior to her alleged fall, any danger posed by the same was open and obvious since it was "readily observable

³ Plaintiff testified that, *minutes before the accident occurred*, her view of the step was obstructed by "darkness" and "no light" (Doc. 17, at p. 45). However, she did not testify that the alleged absence of light caused her to miss the step. Additionally, although plaintiff states in her affidavit that it was difficult to see the step due to poor lighting, the lighting conditions cannot be deemed the proximate cause of the incident since plaintiff admitted that she was looking straight ahead, and not where she was walking, when she fell. *See generally Ridolfi v Williams*, 49 AD3d 295 (1st Dept 2008).

by anyone employing the reasonable use of their senses (citation omitted).” *Zhao v Brookfield Off. Props., Inc.*, 128 AD3d 623, 623 (1st Dept 2015); *see also Barchi v Rudin E. 55th St. LLC*; 144 AD3d 444 (1st Dept 2016).

As defendant argues, and as plaintiff concedes, the platform and the floor of the restaurant had different textures, thereby providing plaintiff with adequate demarcation of the area. Further, although plaintiff argues that the floor of the restaurant and the platform were both darkly colored, thereby creating a hazard, the photographs submitted in support of the motion (Doc. 20) reflect that the carpet covering the floor of the restaurant was a significantly lighter color and had a checkered design, thereby distinguishing it from the platform area. Thus, under the circumstances of this case, plaintiff’s “testimony alone 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 AD3d 319, 325 [1st Dept 2006], *affd* 8 NY3d 931 [2007]), or demonstrate that the step was inherently dangerous or constituted a hidden trap (*see Burke v Canyon Rd. Rest.*, 60 AD3d 558, 559 [1st Dept 2009]).” *Broodie v Gibco Enterps., Ltd.*, 67 AD3d 418, 418-419 (1st Dept 2009).

Plaintiff’s argument that the affidavit of her expert engineer, Fein, raises an issue of fact as to whether defendant created a dangerous condition is also without merit. In his affidavit, Fein relies on ASTM Standard F1637. That standard provides that “[s]hort flight stairs (three or fewer risers) shall be avoided where possible” and otherwise should be made obvious through the use of visual cues, including “contrast in surface colors.” Since the floor of the restaurant was clearly a different color than the platform, Fein fails to raise an issue of fact regarding whether the step violated ASTM standard 1637 and thereby was not in compliance with industry standards, nor was this a “stairs”.

Plaintiff's own affidavit in opposition to the motion fails to raise an issue of fact. In her affidavit, plaintiff asserts, inter alia, that, had a sign had been placed on her table warning of the step, "it most probably would have alerted me of the raised platform and the accident would not have occurred." Doc. 35, at par. 8. Plaintiff also states in extremely general terms that the carpet in the area where she fell "was a dark color and blended in with the dark color of the raised platform." Doc. 35, at par. 8. However, it is well-settled that such conclusory statements and speculation are insufficient to defeat a motion for summary judgment. See *Montiel v Sailsman*, 134 AD3d 470 (1st Dept 2015); *IDX Capital, LLC v Phoenix Partners Group LLC*, 83 AD3d 569 (1st Dept 2011); *Delgado v New York City Hous. Auth.*, 51 AD3d 570 (1st Dept 2008).

In opposing the motion, plaintiff relies, inter alia, on *Saretsky v. 85 Kenmare Realty Corp.*, 85 A.D.3d 89, 92-93, 924 N.Y.S.2d 32 (1st Dept 2011). In that case, the Appellate Division, First Department determined that a triable issue of fact existed as to whether a step that was a similar shade of gray as the adjacent sidewalk constituted a dangerous condition because it created optical confusion. Additionally, a painted line marking the top edge of the step involved in that case was badly worn. *Saretsky* is distinguishable, however, since the platform and the floor of the restaurant herein were not sufficiently similar in color so as to create such confusion and there is no indication that any marking on the step in the restaurant was worn.

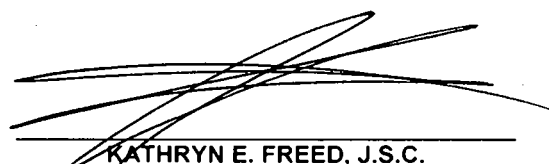
Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendant Hillstone Restaurant Group, Inc. seeking summary judgment dismissing the complaint is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further;

ORDERED that this constitutes the decision and order of the court.

8/17/2018
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED SETTLE ORDER SUBMIT ORDER GRANTED IN PART OTHER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE