

Porto v Golden Seahorse LLC
2019 NY Slip Op 30014(U)
January 2, 2019
Supreme Court, New York County
Docket Number: 162585/2015
Judge: Kathryn E. Freed
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

-----X INDEX NO. 162585/2015

ESTHER PORTO,

Plaintiff,

MOTION SEQ. NO. 002 and 003

- v -

GOLDEN SEAHORSE LLC, and AMAZON RESTAURANT & BAR, INC.,

Defendants.

DECISION AND ORDER

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 91, 92, 93, 100, 101, 102, 103, 104, 105, 107, 109, 110

were read on this motion to/for SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 003) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 94, 95, 96, 97, 98, 99, 111

were read on this motion to/for SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that the motions are decided as follows.

In this personal injury action, plaintiff Esther Porto ("Porto") seeks to recover damages from defendants Golden Seahorse LLC ("Golden Seahorse") and Amazon Restaurant & Bar, Inc. ("Amazon Restaurant") for injuries she allegedly sustained in an accident that occurred in June of 2015. In motion sequence 002, defendant Amazon Restaurant moves, pursuant to CPLR 3212, for summary judgment dismissing the claims of Porto and the cross-claims of co-defendant Golden Seahorse. In motion sequence 003, defendant Golden Seahorse moves, pursuant to CPLR 3212, for summary judgment dismissing the claims of Porto and the cross-claims of co-defendant Amazon Restaurant, and for summary judgment on its cross-claim for contractual indemnity

from Amazon Restaurant. After oral argument, and after a review of the parties' papers and the relevant statutes and case law, the motions are **decided as follows**.

FACTUAL AND PROCEDURAL BACKGROUND:

On June 17, 2015, plaintiff Porto fell down a stairway inside Saint George Tavern, a restaurant located at 103 Washington Street in Manhattan ("the premises"). (Doc. 94 at 2, 6.) The premises are owned by defendant Golden Seahorse (Doc. 75 at 5) but were leased to defendant Amazon Restaurant (*id.*) pursuant to a lease in effect on the date of the accident (Doc. 92). Plaintiff alleges that she was on her way to the restaurant's restroom, located opposite the stairway, when she fell. (Doc. 75 at 3-4.)

The entire event was recorded by a restaurant surveillance camera, and the parties have submitted the video footage taken, to this Court for its review. (Def. Golden Seahorse's Ex. K.) The recording shows that plaintiff was not looking toward the ground and that her head was turned away from the stairway when she fell. (*Id.*) On the video, plaintiff can clearly be seen flailing her arms in an apparent attempt to grasp a handrail. (*Id.*) Plaintiff then fell to the bottom of the staircase. (*Id.*)

At her deposition, plaintiff testified, inter alia, that the restaurant's lighting near the area of the bathroom and stairway was "[v]ery poor" (Doc. 81 at 80.) She also stated that she did not see the stairs before her accident. (*Id.* at 79.) When asked if she tripped on anything on the floor that caused her to fall, plaintiff responded: "No, no, no, the only thing is that when I fell, there was nothing, it was like empty space when I set my foot." (*Id.* at 86.)

Plaintiff commenced this action on December 9, 2015 by filing a summons and complaint against Golden Seahorse. (Doc. 76.) An amended complaint, filed on April 28, 2016, added

Amazon Restaurant as a defendant. (Doc. 77.) In the amended complaint, plaintiff alleged that her injuries resulted from defendants' negligence in their ownership and management of the premises. (*Id.*) Plaintiff's bill of particulars further alleges that defendants violated New York City Building Code §§ 1006.2 and 1009.11.5, as well as New York City Administrative Code § 28-301.1. (Doc. 80 at 3-4.) In its answer, Golden Seahorse cross-claimed against Amazon Restaurant for contribution, common law indemnification, and contractual indemnification. (Doc. 78 at 5-7.) Amazon Restaurant's answer also sets forth a cross-claim for indemnification from Golden Seahorse. (Doc. 79 at 1-2.)

Defendants Amazon Restaurant and Golden Seahorse now move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and each other's cross-claims. Golden Seahorse also moves for summary judgment on its cross-claim for contractual indemnity against Amazon Restaurant.

LEGAL CONCLUSIONS:

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law on the undisputed facts. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) The movant must produce sufficient evidence to eliminate any issues of material fact. (*Id.*) If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact. (*See Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006].) If, after viewing the facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact

exists, then summary judgment will be denied. (*See Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978].)

a. Motion Sequence 002: Whether Amazon Restaurant is Entitled to Summary Judgment Dismissing Plaintiff's Complaint and Codefendant Golden Seahorse's Crossclaims.

It is well established that, in tort cases based on premises liability, “owners and lessees have a duty to maintain their property in a reasonably safe condition.” (*Langer v 116 Lexington Ave., Inc.*, 92 AD3d 597, 598 [1st Dept 2012].) “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.” (*Id.*)

With respect to plaintiff's claims, this Court determines that defendant Amazon Restaurant is entitled to summary judgment dismissing her complaint. An underlying assumption in the standard set forth in *Langer* is that the plaintiff, suing on the theory of premises liability, was injured by a defective condition. Only when the defendant-lessee demonstrates that it neither created nor had notice of the defect will a court grant summary judgment in the defendant's favor. (*See id.*) Here, however, plaintiff has not shown the existence of a dangerous condition that caused her to fall. In fact, the evidence submitted establishes the opposite. The surveillance video illustrates that plaintiff's head was turned away from the stairway just prior to her fall. (Def. Golden Seahorse's Ex. K.) Thus, plaintiff's inattentiveness was the proximate cause of her injuries. (*See Pinkham v West Elm*, 142 AD3d 477 [1st Dept 2016]; *Franchini v American Legion Post*, 107 AD3d 432 [1st Dept 2013]).

Nor does the parties' deposition testimony reflect that there was a defective condition at the premises which caused plaintiff's fall. When asked if anything caused her to trip, plaintiff

responded: “No, no, no, the only thing is that when I fell, there was nothing, it was like empty space when I set my foot.” (Doc. 81 at 86.) At its deposition, Amazon Restaurant testified that there were no prior accidents involving the stairway.¹ (Doc. 83 at 26.) (*See Remes v 513 W. 26th Realty, LLC*, 73 AD3d 665, 666 [1st Dept 2010] (owner of premises established prima facie showing of entitlement to summary judgment by showing that no prior accidents had occurred around the stairway at issue); *see also Lovell v Thompson*, 143 AD3d 511, 511 [1st Dept.2016].)

Plaintiff’s arguments to the contrary are unpersuasive. Plaintiff contends that Amazon Restaurant did not establish its prima facie entitlement to judgment as a matter of law because it “did not submit any evidence when the location of the Defendants’ restrooms and stairway was last inspected before the Plaintiff’s fall” (Doc. 104 at 4.) The cases plaintiff cites are distinguishable because they involved injuries arising from defects in the premises which caused the falls. (*See, e.g., Porco v Marshalls Dept. Stores*, 30 AD3d 284, 284 [1st Dept 2006] (plaintiff slipped on a liquid substance in defendants’ store); *Baptiste v 1626 Meat Corp.*, 45 AD3d 259, 259 [1st Dept 2007] (plaintiff slipped on a puddle of water).) The purpose of requiring lessees to routinely inspect their premises is so that they can remedy a defective condition before anyone is injured from the same. (*See Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008] (“[P]laintiff must also show that the owner had a sufficient opportunity, with the exercise of reasonable care, to remedy the situation.”).) Although Amazon Restaurant did not submit records of when the premises were last inspected prior to plaintiff’s accident, such records would be of no use where, as here, it was plaintiff’s inattentiveness—rather than a defective condition—that caused her to fall. Summary judgment in favor of a lessee

¹ Amazon Restaurant was deposed through its manager, Valentin Andon (“Andon”). When asked if he was “aware of anybody who complained about the location of the restrooms before June 17, 2015,” Andon answered in the negative. (Doc. 83 at 26.)

is appropriately granted where there is no defect. (*See Johnson v 301 Holdings, LLC*, 89 AD3d 550 [1st Dept 2011].)

In a similar vein, although the parties submit conflicting expert opinions addressing the condition of the premises including, inter alia, the lighting and handrails, these opinions do not raise material issues of fact given that plaintiff's inattentiveness caused the accident. *See Outlaw v Citibank, N.A.*, 35 AD3d 564 [2d Dept 2006] [where plaintiff was not looking in direction of alleged defect at time of fall, lighting condition, no matter what it was, could not be deemed proximate cause of the accident]).

Amazon Restaurant is likewise granted summary judgment dismissing plaintiff's remaining allegations concerning New York City Building Code §§ 1006.2 and 1009.11.5, as well as New York City Administrative Code § 28-301.1. Those provisions concern the safety standards of a building and establish regulations governing the use of handrails and how well-lit an area must be. However, as previously discussed, plaintiff's accident was not caused due to a lack of handrails or poor lighting,² but rather because she was not paying attention to her surroundings.

With respect to whether Amazon Restaurant is entitled to summary judgment dismissing co-defendant's cross-claims, because contribution is a doctrine based on the apportionment of liability among tortfeasors, (*see Chase Manhattan Bank v Akin, Gump, Strauss, Hauer & Feld L.L.P.*, 309 AD2d 173, 179 [1st Dept 2003]), Golden Seahorse's cross-claim for contribution is moot.

Similarly, Golden Seahorse's cross-claim for common law indemnification is also dismissed as moot. (*See Chatham Towers, Inc. v Castle Restoration & Constr., Inc.*, 151 AD3d

² A review of the restaurant's surveillance video demonstrates that the area near the stairway was lit and that the stairway had a handrail. (Def. Golden Seahorse's Ex. K.)

419, 420 [1st Dept 2017] (“Common-law indemnification may be pursued by parties who have been held vicariously liable for the party that actually caused the negligence that injured the plaintiff.”).) Finally, while the right to contractual indemnification depends upon the language of the agreement between the two parties—which the parties have submitted as the lease in effect at the time of plaintiff’s accident (Doc. 92)—the issue of what the contractual indemnification provision in their lease requires is inapposite, since Amazon Restaurant did not actually cause plaintiff’s injuries.

b. Motion Sequence 003: Whether Golden Seahorse is Entitled to Summary Judgment Dismissing Plaintiff’s Complaint and Codefendant Amazon Restaurant’s Crossclaim, as well as Summary Judgment on its Crossclaim for Contractual Indemnification from Amazon Restaurant.

Golden Seahorse is the admitted owner of the premises. (Doc. 58 at 5.) The same standard that applies in premises liability cases against lessees also applies to premises liability actions against owners. (*Langer v 116 Lexington Ave., Inc.*, 92 AD3d 597, 598 [1st Dept 2012].) Plaintiff’s injuries were not caused by a defective condition on the premises, but rather from her lack of awareness as to where she was heading. Golden Seahorse’s motion for summary judgment dismissing plaintiff’s complaint and co-defendant Amazon Restaurant’s cross-claim for indemnification is therefore granted, and, based on the previous discussion, it is denied to the extent it seeks summary judgment on its cross-claim for contractual indemnification from Amazon Restaurant.

In light of the foregoing, it is hereby:

ORDERED that defendant Amazon Restaurant & Bar, Inc.'s motion (sequence 002) to dismiss the complaint of plaintiff Esther Porto and the cross-claims of co-defendant Golden Seahorse LLC is granted; and it is further

ORDERED that defendant Golden Seahorse LLC's motion (sequence 003) to dismiss the complaint of plaintiff Esther Porto and the cross-claim of co-defendant Amazon Restaurant & Bar, Inc. is granted, and is denied to the extent it seeks summary judgment on Golden Seahorse's cross-claim for contractual indemnification from Amazon Restaurant; and it is further

ORDERED that, within 30 days after this order is filed with NYSCEF, counsel for the moving parties shall serve a copy of this order with notice of entry upon all parties, and upon the General Clerk's Office at 60 Centre Street, Room 119, and the Clerk is directed to enter judgment accordingly; and it is further

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

1/2/2019
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	DENIED
			<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT