

Yanagisawa v Kyoto Omen U.S.A., Inc.
2019 NY Slip Op 31651(U)
June 7, 2019
Supreme Court, New York County
Docket Number: 157025/2016
Judge: Gerald Lebovits
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. GERALD LEBOVITS PART IAS MOTION 7EFM

Justice

-----X INDEX NO. 157025/2016

NAOKI YANAGISAWA,

MOTION DATE 10/04/2018

Plaintiff,

MOTION SEQ. NO. 001

- v -

KYOTO OMEN U.S.A., INC., PAARVO ROWE, and GIA GIASULO

DECISION AND ORDER

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87

were read on this motion for

SUMMARY JUDGMENT

David Horowitz, P.C., (Gloria Drelich of counsel) and *Jaroslawicz & Jaros PLLC* (David Jaroslawicz of counsel) for plaintiff.

Gallo Vitucci Klar LLP (Chad E. Sjoquist and Kiel Martin Doran of counsel), for defendants, Kyoto Omen U.S.A., Inc., Paarvo Rowe, and Gia Giasulo.

Gerald Lebovits, J.:

Defendants Kyoto Omen, U.S.A., Inc. (Kyoto), Paarvo Rowe (Rowe) and Gia Giasulo (Giasulo) move for summary judgment dismissing the complaint.

This is a trip and fall personal injury action. The complaint alleges as follows: On June 7, 2016, between 8:45 and 9:00 p.m., plaintiff, who was attending an event at a restaurant called Omen, located at 113 Thompson Street, New York, New York, was standing in front of the restaurant, after having three drinks inside. Plaintiff was standing immediately in front of the stairs to the building's basement level. After a while, plaintiff proceeded to go upstairs, and while turning around, tripped and fell down the stairs leading to the basement. As a result of his fall, plaintiff seriously injured his wrist.

Kyoto is the operator of the restaurant and maintains the subject stairway. Rowe and Giasulo are the owners of the premises, including the subject stairway. Plaintiff is suing these parties for maintaining an unsafe and defective premises, for creating a trap and failing to provide safety measures, for failing to warn others of an unsafe premises, and for failure to provide adequate illumination. As a result of defendants' alleged negligence, plaintiff claims to have suffered serious injuries.

Defendants all move for summary judgment to dismiss this action on the grounds that the subject stairway was open and obvious to plaintiff at the time of the accident, and was not

defective or unsafe. Defendants submit the following evidence: deposition testimony from plaintiff, as well as nonparty Hiroko Sakurai; from Erez Steinberg, who is representing Rowe and Giasulo; and from Omen employee Norio Shinohara; an affidavit from Omen secretary Michael Fukui; photographs taken of the accident area; and an investigative report by plaintiff's expert witness Richard Robbins, who is a licensed architect. Defendants also submit an affidavit from their own expert, Vincent Ettari, a licensed engineer who also conducted an investigation of the premises after the accident.

Defendants contend that the evidence demonstrates that the subject stairway is not defective as a matter of law. They claim that at his deposition, plaintiff testified that he was fully aware of the stairway prior to his fall, and acknowledged that when he turned to go upstairs, he was looking at the entrance above him rather than the sidewalk or the stairs below him. Testifying less than a year after the accident, plaintiff could not recall numerous details regarding the accident, such as how he fell and landed, or his position on the ground when he landed, or whether anybody came to help him after the fall.

The nonparty Hiroko Sakurai, a supervisor at plaintiff's workplace, testified as one of the attendants at the aforesaid event. She testified that she was with plaintiff when he was outside the restaurant, prior to the accident. She also testified that she saw him falling down the stairway. Defendants claim that she testified that a few days after the accident, plaintiff told her that he could not recall how he fell.

Norio Shinohara, an employee and manager of Omen, testified on behalf of Kyoto. He described the subject stairs as used by the restaurant for product delivery and for employee access to the restaurant. He testified that the restaurant has multiple lights above the entrances to the restaurant and the basement area, including a light fixture above each stairway and illuminated signs. He also testified about an adjacent building which has a bright white light that illuminates the area, including the basement stairway.

In an affidavit from Omen secretary Michael Fukui, Fukui asserts that the light from the adjacent building was shining on the evening of the accident, and illuminated the front of the restaurant, including the stairs leading to the basement.

Defendants submit the findings of Richard Robbins, plaintiff's expert investigator. Robbins compiled his report after conducting two inspections of the premises, on the afternoon of August 31, 2017 and on the evening of January 24, 2018. He took a light reading at 5:30 p.m. on January 24 to measure the amount of light that may have reflected on the subject stairway at the time of the accident. He concluded that the light measured at .83 foot-candles, below the minimal lighting required, which is 1 foot-candle, based on the New York City Building Code (Code).

Robbins' report cited various violations of the Code. In addition to poor illumination, the report referred to the lack of a second handrail on the stairway and the existing handrail failing to extend to the top of the stairs, non-uniform riser heights, the lack of a chain or safety device in front of the stairway, and the lack of a yellow line on the edge of the stairs. These conditions are

said to be of an unsafe and defective nature, and evidence of negligence on the part of defendants.

Defendants challenge the report and submit the conclusions made by their expert Vincent Ettari. Ettari inspected the premises on three occasions: June 7, 8 and 9, 2018. On June 7, he measured the light levels at 8:45 and 9:00 p.m. finding the levels to be, respectively 1.467 foot-candles and .986 foot-candles, which he deemed adequate lighting. Ettari considered these measurements to be similar to those at the time of the accident.

Defendants argue that Robbins took the light readings at a time that was not similar to time of the accident. They consider the results to be inadequate. Moreover, their examination of the photos indicates, in their opinion, that Robbins was blocking the light from the adjacent building, which resulted in a lower light reading. They argue that Robbins never mentioned the light of the adjacent building in his observations. On the other hand, defendants claim that Ettari, in his light reading, did not block the aforesaid light and this resulted in a brighter and more accurate reading.

As for the balance of Robbins' report, defendants and Ettari criticize almost every aspect of the findings. They argue that: (1) Robbins fails to refer to specific Code provisions which defendants violated, and that most of the Code provisions cited are not applicable to the stairway. Ettari contends that the stairway was constructed in 1900, along with the building, and that all the Codes cited by Robbins are not applicable to such a structure; (2) based on the standards of 1900, the stairway is not defective. For example, in 1900, there was no need for the installation of a second handrail; and (3) the stairway is exempt from the Codes for the additional reasons that it is an exterior stairway which does not have a roof and is separated from the basement door by a platform, and it is an access stairway which does not run to the roof of the building.

Finally, defendants argue that such allegations of a lack of a chain or an additional handrail as evidence of negligence are not relevant, because there is no evidence that a lack of a handrail, for example, was instrumental in causing plaintiff's fall. Defendants contend that the subject stairway affords a reasonable degree of safety if one exercises a reasonable amount of caution while descending it.

Plaintiff opposes the motion, arguing that defendants failed to make out a prima facie case for summary judgment. Alternatively, plaintiff argues that there are material issues of fact here which would preclude the granting of summary judgment.

Plaintiff argues that the entrance of the subject stairway was defective and dangerous at the time of the accident. Plaintiff contends that there was a gap-like trap which caused him to trip. Specifically, the top stair extended into the sidewalk a distance of 2 ½ inches further than the adjoining stairway bannister, and it was this area into which plaintiff stepped and fell. In his affidavit, plaintiff refers to the gap on the sidewalk that allegedly caused him to fall down the stairway. Plaintiff also refers to poor lighting in front of the stairway which prevented him from noticing the gap. Plaintiff avers that there was a lack of a chain across the entrance of the stairway that could have prevented the fall, as well as the lack of any other safety device or warning of a dangerous condition.

Plaintiff submits an affidavit from Robbins, who argues that upon his inspections, the subject stairway was defective, defendants created inadequate lighting conditions and a gap existed on the stairway entrance. He states that at the time, he noticed a chain across the stairway entrance which blocked the entrance. He contends that such a chain was absent at the time of the accident.

Robbins defends his light reading, claiming that the conditions on the day of his reading were similar to those on the day of the accident. He denies that he blocked any light when he conducted the reading and apparently denies the existence of light from an adjacent building. Robbins refers to sections 1006.1 and 1006.2 of the 2014 Code, pertaining to illumination for means of egress. He asserts that defendants violated these sections.

In discussing Ettari's affidavit, Robbins states that Ettari's statements are conclusory as to the condition of the stairway, and that he summarily dismisses the Code provisions. Robbins argues that regardless of the Code provisions, common-law negligence can be asserted in this case, such as defendants' failure to repair the gap, failure to provide adequate illumination, and failure to provide warnings or safety measures.

Robbins also questions Ettari's claim that the stairway was structured in 1900. According to Robbins, Ettari has only provided certified copies of City property tax records. He argues that such records merely state that the building was built in 1900 and renovated in 1988. Robbins contends that Ettari has not mentioned the renovation or renovations in any detail, and whether they concerned the subject stairway, nor has he submitted any certified records of renovations. Robbins argues that the records submitted are inadequate in concluding that the Code provisions are not applicable to the subject stairway.

In reply, defendants repeat their arguments, questioning Robbins' light reading, and upholding Ettari's claims that the stairway is not subject to the Code provisions that were in effect after 1900. They dismiss Robbins' report as speculative for not citing any statute, code or industrial standard when claiming that a lack of a chain or safety device or warning was proof of negligence.

They argue that plaintiff's affidavit contradicts his deposition testimony, where he stated that he knew the stairway was immediately next to the sidewalk. Defendants also question the accuracy of his affidavit, arguing that he needed a translator during his deposition, due to his faulty spoken English. Defendants contend that plaintiff's affidavit is not admissible because there is no proof that it was properly translated.

"It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues" (*Birnbaum v Hyman*, 43 AD3d 374, 375 [1st Dept 2007]). "The substantive law governing a case dictates what facts are material, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment [citation omitted]" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008]).

On a motion for summary judgment, the movant must “make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact” [internal quotation marks and citation omitted] (*Richardson v County of Nassau*, 156 AD3d 924, 925 [2d Dept 2017]). Only if the movant succeeds in meeting its burden will the burden shift to the opponent to demonstrate through legally sufficient evidence that there exists triable issues of fact (*id.*).

It is settled that, with respect to premises liability, “[l]iability for a dangerous condition is generally predicated on ownership, control or a special use of the property” (*Colon v Corporate Bldg. Groups, Inc.*, 116 AD3d 414, 414 [1st Dept 2014]). “A plaintiff alleging injury caused by a dangerous condition must show that defendant either created the condition, or failed to remedy it, despite actual or constructive notice thereof [citations omitted]” (*Haseley v Abels*, 84 AD3d 480, 482 [1st Dept 2011]).

First, the court shall determine the admissibility of plaintiff’s affidavit. In his deposition, plaintiff testified that he saw the basement stairway before he fell and was facing the upstairs stairway before falling. He did not mention a gap between the sidewalk and the entrance of the basement stairway. Plaintiff did briefly state that it was dark at the time and there was no chain in front of the stairway’s entrance. Plaintiff’s affidavit is more detailed in his discussion of the darkness on that evening and the unsafe nature of the stairway, especially the gap area upon which he allegedly tripped over. However, defendants point out that plaintiff required a translator during his deposition, and that it is apparent that the affidavit could be an English translation, though no evidence of this is provided.

CPLR 2101 (2) requires that affidavits be submitted in English, and if an affidavit has been translated into English, the original non-English affidavit must be submitted, along with an affidavit from the translator who attests to his or her qualifications as a translator and certifies the accuracy of the translation (*see Eustaquio v 860 Cortlandt Holdings, Inc.*, 95 AD3d 548, 548 [1st Dept 2012]).

Here, plaintiff has a limited proficiency in English, as demonstrated at his deposition, and so in the absence of any proof of an accurate translation of the affidavit, the court shall disregard it as evidence. Plaintiff’s deposition testimony thereby stands as his direct explanation of his accident, which, as defendants argue, offers a generally vague recollection of the experience.

The conflicting expert evidence provided by plaintiff and defendants raises some issues of fact. First of all, there is the argument raised by Ettari that Robbins’ conclusions are largely speculative because he failed to specify the Code violations as they relate to the subject stairway on the day of the accident. In his report, Robbins asserts that defendants violated section 28-301.1 of the 2014 Code, which refers to an owner’s responsibilities in the maintenance of its property; sections 1006.1 and 1006.2, which refer to illumination; section 1009.4.2, which refers to riser heights on stairs; and sections 1009.12 and 1012.6, which refer to handrails and handrail extensions.

Robbins also cites sections from the 1922, 1937 and 1968 Codes when discussing risers, guards and handrails on stairs, as well as the 1995 ASTM F 1637-95 Standard Practice for Safe

Walking Surfaces, established by the American Society for Testing and Materials, when addressing illumination. Robbins does not specifically cite a Code section when discussing the lack of a chain or other safety device.

In addition, Ettari argues that because of the age of the stairway, it cannot be subjected to the standards of the aforesaid Codes, unless those provisions are expressly retroactive, which Ettari denies they are. In response, Robbins argues that Ettari's evidence, including certified copies of property tax records concerning the building, is insufficient, as it may not relate to the subject stairway, and that the reference to renovations to the building does not specify whether the stairway was subsequently renovated.

The court takes into account that the records provided by defendants are not conclusive as to the exact age of the subject stairway. Moreover, the court notes that though plaintiff cites Code violations as proof of negligence, plaintiff contends that this is also an action in common law negligence. Thus, even in the absence of a Code violation, defendants can be held liable for negligence based on a breach of a duty of due care. The complaint alleges that defendants are jointly and severally liable for common law negligence as well as for violations of unspecified codes and regulations. Those regulations have been specified by Robbins.

The court finds that whether or not the subject stairway is subject to any of the Code provisions is an issue of fact. Even if this is not the case, defendants can remain liable if it is shown that the stairway or the premises in the possession of defendants was otherwise defective, and such defect or defects were the proximate cause of the accident. It is settled that violations of Code regulations are evidence of negligence rather than negligence per se (*see Long v Forest-Fehlhaber*, 55 NY2d 154, 160 [1982]).

The issue of whether the area was properly illuminated is a material issue of fact, since both experts reached very different conclusions upon their light readings. Of course, both were attempting to duplicate the lighting as it occurred at the time of the accident, which had occurred years earlier. The matter of the light from an adjacent building, which was emphasized in defendants' papers, was not addressed by plaintiff, and defendants' claim that, based on an observation of his photographs, Robbins had blocked that particular light while rendering his reading, raises a jury question.

The issue of illumination may be the most pertinent one in this case, that is, the major alleged defect regarding the subject stairway and its surroundings. As it is not established that the illumination at the time of the accident was adequate, either by regulatory or common law standards, the motion for summary judgment must be denied.

Accordingly, it is

ORDERED that defendants Kyoto Omen U.S.A., Inc., Paarvo Rowe and Gia Giasulo's motion for summary judgment is denied.

6/7/2019

DATE



GERALD LEBOVITS, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: