

<b>Scalone v 34 E. Broadway, Inc.</b>
2019 NY Slip Op 34177(U)
August 26, 2019
Supreme Court, Suffolk County
Docket Number: 16-610745
Judge: Joseph C. Pastoressa
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SHORT FORM ORDER

INDEX No. 16-610745

CAL. No. 18-02094OT

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 34 - SUFFOLK COUNTY

**PRESENT:**

Hon. JOSEPH C. PASTORESSA  
Justice of the Supreme Court

MOTION DATE 3-6-19  
ADJ. DATE 4-17-19  
Mot. Seq. # 001 - MD

-----X  
LORRAINE J. SCALONE and ODELL  
SCALONE,  
  
Plaintiffs,  
  
- against -  
  
34 E. BROADWAY, INC., d/b/a THE FIFTH  
SEASON,  
  
Defendant.  
-----X

PONTISAKOS & BRANDMAN, P.C.  
Attorney for Plaintiffs  
600 Old Country Road, Suite 323  
Garden City, New York 11530  
  
O'CONNOR, O'CONNOR, HINTZ &  
DEVENEY, LLP  
Attorney for Defendant  
One Huntington Quadrangle, Suite 1C10  
Melville, New York 11747

Upon the following papers on this e-filed motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers by defendant, dated January 29, 2019; Notice of Cross Motion and supporting papers   ; Answering Affidavits and supporting papers by plaintiffs, dated April 2, 2019; Replying Affidavits and supporting papers by defendant, dated April 10, 2019; Other   ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that the motion by defendant for summary judgment dismissing the complaint is denied.

Plaintiff Lorraine J. Scalone commenced this action to recover for personal injuries she allegedly sustained on May 27, 2016, at the commercial premises known as The Fifth Season, located at 34 East Broadway in Port Jefferson, New York, which is operated and leased by defendant 34 E. Broadway, Inc., d/b/a The Fifth Season. Plaintiff allegedly was adjusting the wooden blinds of the window closest to her table, when they detached and struck her in the face. Plaintiff alleges that defendant was negligent, among other things, in failing to maintain its premises in a reasonably safe condition. Plaintiff's husband, Odell Scalone, also sues derivatively for loss of services.

Defendant now moves for summary judgment dismissing the complaint. Defendant argues that it neither created the alleged defective, nor had notice of its existence. In the alternative, defendant argues that any alleged negligence was not the proximate cause of plaintiff's injuries. In support of its motion,

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defendant submits, among other things, the pleadings, the deposition testimony of plaintiffs, Jennifer Orlowski, Julio Cesar Romero, Heather Sini, and Kenneth Bossert, and the affidavit of Deborah Urbinati. In opposition, plaintiffs contend that defendant failed to demonstrate, prima facie, that it lacked notice of the allegedly defective blinds, and that plaintiff's conduct of adjusting the blinds was not a superseding cause relieving defendant of liability. Plaintiffs submit, among other things, an affidavit of Grahme Fischer.

According to plaintiff's deposition testimony, she and her husband escorted themselves to a table on the second floor of the premises on the date of the accident. She stated that the wooden blinds of the window closest to their table were originally lowered and partially open. This window allegedly was approximately two feet away from her table. After sitting down, she allegedly went to open the blinds to see the sunset. She testified that she had been pulling the cord which controlled the blinds for one second, when the blinds struck her in the face. Similarly, Mr. Scalone testified that within one second of trying to open the blinds, they fell down and struck her in the face. Plaintiffs also testified that prior to the accident, they did not see any employees on the second floor of The Fifth Season.

The president of defendant, and a general manager of The Fifth Season, Jennifer Orlowski, testified that she was on the second floor of the restaurant at the time of the accident, but did not witness it. She testified that the blinds were installed in April of 2008, and that prior to the accident, they were never repaired or replaced. She stated that there was a cord on the left side of the blinds that was used to adjust the slats, and that there was a cord on the right side of the blinds which was used to raise and lower them. She stated that the dishwashers cleaned the blinds on a daily basis. She admitted that prior to the accident, she had observed another customer open the blinds on the premises. She also admitted that there were no signs advising customers not to adjust the blinds. According to her testimony, she was not aware of any prior instances where a customer was injured as a result of the blinds falling.

An employee of The Fifth Season, Julio Cesar Romero, testified that he was present when the accident occurred. According to his testimony, plaintiff was pulling the cord controlling the blinds with both hands, as Orlowski was standing a few feet away from her. He admitted that he did not say anything to stop her from adjusting the blinds. Although he stated that customers had approached him or other employees to adjust the blinds for them, he admitted that there were no signs warning customers not to adjust the blinds, and that he was never advised to stop customers from adjusting them. He further testified that he observed a customer adjusting the blinds approximately six months before the accident. He also stated that he was not aware of any employees having difficulty adjusting any of the blinds on the premises.

A customer of The Fifth Season, Heather Sini, testified that she was sitting at the table next to plaintiffs' table, and that she witnessed the accident. She stated that plaintiff walked over to the blinds, grabbed the cord on the right side of them, and started to pull the cord. Plaintiff allegedly reached for the cord from a distance of about three feet away from the window, and pulled the cord with her body weight. Sini testified that plaintiff raised the blinds approximately between 1½ to 2 feet, when the blinds came down and struck her in the face. Prior to the incident, Sini allegedly heard a snapping noise.

Another customer of The Fifth Season, Kenneth Bossert, testified that he was sitting at the table next to plaintiffs' table, with Sini, and that he was facing plaintiffs at the time of the accident. He stated that

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plaintiff had been attempting to adjust the blinds for approximately 30 seconds when they detached. He did not recall seeing any signs in the restaurant advising customers not to operate the blinds.

An owner of The Fifth Season, Deborah Urbinati, alleges that there were 15 sets of wooden blinds on the premises, which were installed in April of 2008. She contends that prior to the incident, they had not been repaired or removed since their installation. She avers that the blinds are typically lowered, covering the entirety of each window, and that the slats of the blinds are usually open to permit the most light to enter. She avers that customers have requested that the blinds be closed. She admits that the blinds are heavy, and that they "do take some strength to operate." She states that they have been lifted and lowered by employees, without problem, to clean the inside of the windows at least once per week since their installation. She contends that no staff member has advised her that they have had difficulty lifting or lowering any of the blinds, that any of them were unstable, or that any had come away from the wall. She states that prior to the accident, she has operated the window blinds on at least five occasions, without any problem. In addition, she contends that prior to the accident, no section of any of the blinds has ever detached or felt loose. She further contends that no patron, employee, or any other person has ever complained of having difficulty in operating the blinds on the premises.

A landowner, or a party in possession or control of real property, has a duty to maintain its property in a reasonably safe condition (see *Kellman v 45 Tiemann Assoc.*, 87 NY2d 871; *Pilgrim v Avenue D Realty Co.*, 173 AD3d 788; *Chang v Marmon Enters., Inc.*, 172 AD3d 678). To be entitled to summary judgment in a premises liability case, a defendant must show, prima facie, that it did not create the allegedly dangerous condition, and that it did not have actual or constructive notice of it (see *Falco-Averett v. Wal-Mart Stores, Inc.*, 174 AD3d 506; *Pilgrim v Avenue D Realty Co.*, *supra*; *Caban v Kem Realty, LLC*, 172 AD3d 1302; *Reed v 64 JWB, LLC*, 171 AD3d 1228). A defendant has constructive notice of a dangerous condition when the condition is visible and apparent, and it has existed for a sufficient length of time prior to the accident that it could have been discovered and corrected (see *Velasquez v Pro Park, Inc.*, 173 AD3d 1246; *Chang v Marmon Enters., Inc.*, *supra*; *Reed v 64 JWB, LLC*, *supra*).

Here, defendant failed to establish as a matter of law that it lacked constructive notice of the alleged defect (see *Gatto v Coinmach Corp.*, 172 AD3d 1176; *Neve v City of New York*, 117 AD3d 1006; *Alexander v New York City Hous. Auth.*, 89 AD3d 969; *Ramos v Mac Laundry Hemp, Inc.*, 22 AD3d 822). In support of the motion, defendant failed to submit any evidence as to when the blinds were last inspected prior to the accident or that the condition was a latent defect that could not have been discovered upon a reasonable inspection (see *Gairy v 3900 Harper Ave LLC*, 146 AD3d 938; *McGough v Cryan, Inc.*, 111 AD3d 900). The defendant claims that there was nothing wrong with the blinds but did not submit sufficient evidence to support this contention.

In addition, the defendant failed to make a prima facie showing that the plaintiff's conduct was a superseding cause which relieved it of liability (see *Munoz v Kiryat Stockholm, LLC*, 162 AD3d 889; *Rodriguez v 250 Park Ave., LLC*, 161 AD3d 906; *Garris v Lindemann*, 117 AD3d 785). Although there was testimony that the plaintiff pulled on the cord with her body weight, the plaintiff testified that she pulled on the cord with her arm for one second when the blinds fell. There was also testimony from Orlowski and Romero that they observed another customer adjust the blinds sometime prior to the accident. Thus, the

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defendant failed to establish as a matter of law that the plaintiff's action was unforeseeable or of such a character as to sever the causal connection between defendant's alleged negligence and plaintiff's injury (see *Munoz v Kiryat Stockholm, LLC*, *supra*; *Garris v Lindemann*, *supra*; *Grossi v Sylak*, 72 AD3d 895; *Mazzio v Highland Homeowners Assn. & Condos*, 63 AD3d 1015; *Soomaroo v Mainco El. & Elec. Corp.*, 41 AD3d 465; *Gomez v Hicks*, 33 AD3d 856).

Accordingly, the defendant's motion for summary judgment ~~dismissing the complaint~~ is denied.

Dated: August 26, 2019



HON. JOSEPH C. PASTORESSA, J.S.C.

       FINAL DISPOSITION      X   NON-FINAL DISPOSITION