Hershkowitz v Scotto LLC
2020 NY Slip Op 30181(U)
January 27, 2020
Supreme Court, Suffolk County
Docket Number: 15-948
Judge: Martha L. Luft

[* 1]

SHORT FORM ORDER

INDEX No. 15-948
CAL. No. 18-02268OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. MARTHA L. LUFT
Acting Justice of the Supreme Court

MOTION DATE 5-28-19
ADJ. DATE 8-27-19
Mot. Seq. # 002 - MD

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DAVID HERSHKOWITZ,

Plaintiff,

- against -

SCOTTO LLC, SMITHTOWN STEAKHOUSE, LLC, doing business as INSIGNIA STEAKHOUSE, MASTERCRAFT SPECIALTIES, INC., THE J. PERSING COMPANY, PERSING ENTERPRISES INC., doing business as J. PERSING, and THE PEGASUS GROUP,

Defendants.

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Upon the following papers read on the motion for summary judgment: Notice of Motion/Order to Show Cause and supporting papers by defendants Scotto LLC and Smithtown Steakhouse, LLC, d/b/a Smithtown Steakhouse, filed April 16, 2019; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers by plaintiff, filed July 24, 2019, and by defendants Mastercraft Specialties, Inc., and Persing Enterprises, Inc., filed August 14, 2019, ; Replying Affidavits and supporting papers by defendants Scotto LLC and Smithtown Steakhouse, LLC, d/b/a Smithtown Steakhouse, filed August 27, 2019; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion for summary judgment by defendants Scotto LLC and Smithtown Steakhouse LLC d/b/a Insignia Steakhouse is denied.

In this personal injury action, plaintiff, David Hershkowitz, alleges that he was at the Insignia Steakhouse (Insignia) in Smithtown, New York, for dinner on October 20, 2013. During the dinner, a leg of the chair in which plaintiff was sitting allegedly broke off, causing the chair to collapse. Insignia allegedly is owned/operated by defendants Scotto LLC and Smithtown Steakhouse LLC d/b/a Insignia Steakhouse (Smithtown Steakhouse) (collectively, the Scotto defendants).

The Scotto defendants now move for summary judgment dismissing the complaint against them, contending that they did not create a defective condition in the restaurant and had no actual or constructive notice of same. In support of their motion, the Scotto defendants submit, among other things, the pleadings; a bill of particulars; plaintiff's deposition testimony; the deposition testimony of Arthur Viana, who testified as a representative of Smithtown Steakhouse; post-accident photographs of the chair in question; and an affidavit from Arthur Viana. In opposition, plaintiff argues that the Scotto defendants have failed to meet their prima facie burden on summary judgment, and that there is a triable question of fact on the issue of constructive notice. Plaintiff submits the affidavit of Lee Winter, an engineer. Defendants Mastercraft Specialties, Inc., and Persing Enterprises Inc. adopt plaintiff's arguments in opposition to the Scotto defendants' motion. In reply, the Scotto defendants submit a supplemental affidavit from Viana.

On a motion for summary judgment, the movant has the burden to show that it is entitled to judgment as a matter of law and that there are no disputed issues of material fact (CPLR 3212; ***Matter of New York City Asbestos Litig.***, 33 NY3d 20, 99 NYS3d 734 [2019]). If the movant meets its burden, then the non-movant must show that there is a material issue of fact to be resolved at trial (***Matter of Eighth Jud. Dist. Asbestos Litig.***, 33 NY3d 488, 105 NYS3d 353 [2019]). If the movant does not meet its burden, then the motion must be denied without consideration of any opposing papers (***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]). On summary judgment, the Court must view the evidence in the light most favorable to the non-moving party (*id.*).

It is well-settled that a landowner has a duty to maintain its property in a reasonably safe condition (***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]; ***Jaklitsch v Kelly***, 176 AD3d 792, 110 NYS3d 438 [2d Dept 2019]). "In a premises liability case, a defendant property owner, or a party in possession or control of real property, who moves for summary judgment has the initial burden of making a prima facie showing that it neither created the alleged defective condition nor had actual or constructive notice of its existence" (***Kyte v Mid-Hudson Wendico***, 131 AD3d 452, 453, 15 NYS3d 147, 148 [2d Dept 2015], *lv denied* 26 NY3d 915, 23 NYS3d 640 [2015]; *see* ***Caban v Kem Realty, LLC***, 172 AD3d 1302, 101 NYS3d 422 [2d Dept 2019]). A defendant has constructive notice of a premises defect "when the defect is visible and apparent, and existed for a sufficient length of time before the accident that it reasonably could have been discovered and corrected" (***Butts v SJF, LLC***, 171 AD3d 688, 689, 97 NYS3d 219, 221 [2d Dept 2019]; *see* ***Bennett v Alleyne***, 163 AD3d 754, 81 NYS3d 504 [2d Dept 2018]). "To meet its burden on the issue of lack of constructive notice, a defendant is required to offer evidence as to when the accident site was last cleaned or inspected prior to the accident" (***Butts v SJF, LLC***, *supra*; *see* ***Jeremias v Lake Forest***

Estates, 147 AD3d 742, 46 NYS3d 188 [2d Dept 2017]). Evidence of general inspection practices is insufficient to show a lack of constructive notice (***Lopez v Marshalls***, 123 AD3d 981, 999 NYS2d 866 [2d Dept 2014]; ***Green v Albemarle, LLC***, 107 AD3d 948, 966 NYS2d 904 [2d Dept 2013]). The defendant must tender evidence about the "particularized or specific inspection or []cleaning procedure" used (***Birnbaum v New York Racing Assn., Inc.***, 57 AD3d 598, 599, 869 NYS2d 222, 223-224 [2d Dept 2008]; *see* ***Fernandez v Festival Fun Parks, LLC***, 122 AD3d 794, 996 NYS2d 676 [2d Dept 2014]), and those particular procedures must be reasonable (***Hoffman v United Methodist Church***, 76 AD3d 541, 906 NYS2d 328 [2d Dept 2010]; ***Colon v Bet Torah, Inc.***, 66 AD3d 731, 887 NYS2d 611 [2d Dept 2009]). The Court of Appeals has even held, in a strikingly analogous case involving a restaurant patron who was injured when a chair collapsed, that the defendant must show that its inspection practices were reasonable in order to meet its prima facie entitlement to summary judgment (***Catalano v Tanner***, 23 NY3d 976, 989 NYS2d 9 [2014], *revg* 112 AD3d 1299, 978 NYS2d 494 [4th Dept 2013]). Constructive notice will not be imputed, though, when the "defect is latent and would not be discoverable upon a reasonable inspection" (***Jackson v Conrad***, 127 AD3d 816, 817, 7 NYS3d 355, 357-358 [2d Dept 2015]; *see* ***Marinaro v Reynolds***, 152 AD3d 659, 59 NYS3d 87 [2d Dept 2017]).

Here, plaintiff testified that he went to Insignia with his family to celebrate his youngest daughter's birthday. Plaintiff was sitting in a wooden chair with four legs. Soon after being served food, between 6:45 p.m. and 7:00 p.m., "the chair collapsed underneath [plaintiff]." Plaintiff testified that one of the chair legs on the left side (as one sits in the chair) broke off, and that there was no warning that the chair was going to collapse. Plaintiff had been seated for approximately 30 to 40 minutes before the incident, and he did not notice anything unusual about the chair.

Arthur Viana, a member of Smithtown Steakhouse and its chief financial officer and facilities operation manager, explained that he was "responsible for every physical aspect of the building." Viana was not at Insignia when the incident happened, and he first became aware of the incident when he read an incident report written by David Gershwin, then a manager at Insignia. He did, though, investigate the incident. He "had possession of the physical chair" that collapsed underneath plaintiff and the leg that broke off of it. Viana observed that the chair was broken in its front left leg and was "defective." No part of the front left leg was still attached to the chair. Viana had the chair inspected by nonparty Zarra Construction and Cabinetry (Zarra), a carpentry company, within a week of the incident. Zarra opined that the chair was defective. Within a couple of weeks of the incident, Zarra also contacted defendant Mastercraft Specialties, Inc. (Mastercraft), the manufacturer of the subject chair. Mastercraft, Viana testified, admitted that the chair was defective. Viana stated that before plaintiff's incident, none of the same model chairs broke or was wobbly.

Viana also testified that he would perform monthly inspections of Insignia. Those monthly inspections included Viana's "favorite" part, "risk assessment. [Viana] literally look[ed] at every single square inch of the building and ma[de] sure no one [was] going to get hurt." "The chairs," Vianna added, "are a big one, a huge one, because we are asking people to have trust in us that everything that they are sitting in won't break." Viana said that if there was "a tear in the seat[] or a hole caused by someone smoking a cigarette out in the chair," he "would be responsible for making sure that that chair gets reupholstered[,] or if it got nicked or scratched, to follow up that somebody re-stains that chair or touches

it up with a little metallic paint if it was an aluminum[-]framed chair." Viana also noted that the chairs were delivered to Insignia fully assembled.

In his affidavit, Viana reiterated that he inspected Insignia "on a monthly basis," that the inspections included the dining room chairs, and that he "can affirmatively state that [he] inspected the chair involved in [plaintiff's] accident within a month prior to his accident." Viana also said that he "directed his restaurant managers to perform regular inspections of the tables and chairs at Insignia Steakhouse," and that "[s]uch inspections would be done on a daily basis prior to and including" the date of the accident. He did not provide any additional details of what precisely either set of inspections consisted of.

Here, the Scotto defendants failed to demonstrate their prima facie entitlement to summary judgment. As explained above, evidence about general inspection practices is insufficient (***Lopez v Marshalls***, *supra*; ***Green v Albermarle, LLC***, *supra*); instead, in order to meet their prima facie burden, the Scotto defendants had to submit evidence about the specific inspection procedure that they utilized (***Birnbaum v New York Racing Assn., Inc.***, *supra*; ***Fernandez v Festival Fun Parks, LLC***, *supra*). As explained above, the only specific procedures for chair inspections detailed by Viana were cosmetic in nature; he did not specifically explain how, if at all, he inspected the chairs' stability or sturdiness. Viana "did not establish the reasonableness of [the Scotto defendants'] inspection practices such that [they were] entitled to judgment as a matter of law" (***Salvania v University of Rochester***, 137 AD3d 1607, 1609, 27 NYS3d 768, 770 [4th Dept 2016]; *see* ***Catalano v Tanner***, *supra*; ***Yune Rhee v DJ's Intl. Buffet***, 36 Misc 3d 1235[A], 959 NYS2d 92 [Sup Ct, Queens County 2012]; *see generally* ***Hoffman v United Methodist Church***, *supra*; ***Colon v Bet Torah, Inc.***, *supra*). The Court did not consider Viana's second affidavit submitted with the Scotto defendants' reply papers, as a party may not rely on evidence submitted for the first time in its reply papers to satisfy its prima facie burden (***Refuse v Wehbeh***, 167 AD3d 956, 89 NYS3d 302 [2d Dept 2018]; ***Gairy v 3900 Harper Ave., LLC***, 146 AD3d 938, 45 NYS3d 564 [2d Dept 2017]; ***Barrera v MTA Long Is. Bus***, 52 AD3d 446, 859 NYS2d 483 [2d Dept 2008]).

In any event, Viana also said in his affidavit that he "directed [the] restaurant managers to perform regular inspections of the tables and chairs at Insignia," and that those "inspections would be done on a daily basis prior to and including" the date of the incident. But the Scotto defendants failed to submit any evidence about whether those daily inspections actually happened on a daily basis (*see* ***Clarkin v In Line Rest. Corp.***, 148 AD3d 559, 52 NYS3d 304 [1st Dept 2017]; ***Gerbi v Tri-Mac Enters. of Stony Brook, Inc.***, 34 AD3d 732, 826 NYS2d 101 [2d Dept 2006]), what specifically those daily inspections consisted of (***Birnbaum v New York Racing Assn., Inc.***, *supra*; ***Fernandez v Festival Fun Parks, LLC***, *supra*), or their results. Thus, they have failed to sufficiently show when the subject chair was "last . . . inspected prior to the plaintiff's accident" (***Reed v 64 JWB, LLC***, 171 AD3d 1228, 1229, 98 NYS3d 636, 638 [2d Dept 2019]; ***Troina v Canyon Donuts Jericho Turnpike, Inc.***, 166 AD3d 706, 86 NYS3d 78 [2d Dept 2018]) or that the daily inspections were reasonable (***Catalano v Tanner***, *supra*; ***Salvania v University of Rochester***, *supra*; ***Yune Rhee v DJ's Intl. Buffet***, *supra*).

A different conclusion is not required because plaintiff did not notice anything unusual with the chair and there were previously no similar incidents at Insignia. In ***Catalano***, the "plaintiff did not notice anything wrong with the chair when he sat down"; in fact, the "plaintiff testified that he went to the restaurant five

mornings per week, that he and his dining companions sat at the same table and in the same chairs every morning, and that neither he nor his companions had ever experienced any problems with the chairs" (112 AD3d at 1300, 978 NYS2d at 495). Similarly, the defendant in ***Catalano*** "received no complaints about the chairs and no such chair had broken previously" (*id.*). Nonetheless, the Court of Appeals held that it was improper to grant the defendant restaurant owner summary judgment because the restaurant owner "failed to establish [her] prima facie entitlement to judgment as a matter of law concerning the reasonableness of her inspection practices" (23 NY3d at 977, 989 NYS2d at 9). Here too, as explained above, the Scotto defendants failed to show that their chair inspection practices were reasonable. Finally, the Scotto defendants have failed to show that the defect "could not have been discoverable upon a reasonable inspection" and was latent (***Gairy v 3900 Harper Ave., LLC***, 146 AD3d 938, 939, 45 NYS3d 564, 565 [2d Dept 2017]; *see* ***Arevalo v Abitabile***, 148 AD3d 658, 48 NYS3d 506 [2d Dept 2017]).

Accordingly, the Scotto defendants' motion for summary judgment is denied.

Dated: 1/27/20

Marsha E Ce
A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**