

Acevedo v Town of Eastchester
2020 NY Slip Op 34588(U)
March 6, 2020
Supreme Court, Westchester County
Docket Number: Index No. 65895/2017
Judge: Terry Jane Ruderman
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.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
LISETTE ACEVEDO and LUCIO BRUNER,

Plaintiffs,

DECISION and ORDER

-against-

Motion Sequence No. 1
Index No. 65895/2017

TOWN OF EASTCHESTER and MULINO'S AT
LAKE ISLE,

Defendants.

-----X
RUDERMAN, J.

The following papers were considered in connection with defendants' motion pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation, Affidavits, Exhibits A - N, and Memorandum of Law	1
Affirmation in Opposition, Exhibits 1 - 9, and Memorandum of Law	2
Reply Affirmation	3

This is an action for personal injuries allegedly sustained by plaintiff Lisette Acevedo on January 22, 2017, between 12:30 a.m. and 1:30 a.m., when she slipped and fell on the dance floor at Mulino's at Lake Isle ("Mulino's"), an event venue located at 660 White Plains Road in Eastchester, New York. The action was commenced by the filing of a summons and complaint on October 3, 2017. Plaintiffs allege that defendant Town of Eastchester owns, manages, maintains and controls the building in which Mulino's operates as a catering hall and restaurant. The answer filed by each defendant interposed a cross-claim against the other.

Plaintiff Acevedo testified at her deposition that she arrived at Mulino's at approximately 10:00 p.m. that night, with her husband, plaintiff Lucio Bruner, and several friends, to attend disco night with singer France Joli. The concert ended at approximately 1:00 p.m., but a disc jockey continued to play music, and Acevedo and her friends remained, talking and dancing, although her husband left after the concert. Acevedo was dancing on the dance floor with her friends when she slipped and fell.

Acevedo described the cause of her fall as a liquid on the floor, which she felt on her clothing after she fell; she said two of her friends observed the liquid at that time. Other friends helped her into a chair, and a man who identified himself as one of the owners brought her some ice, asked if she needed anything, and asked what had happened.

Additionally, Acevedo testified that when they first arrived at Mulino's and started dancing, on a different part of the dance floor, approximately two hours before her accident, she and her friends noticed that the dance floor was slippery, and stepped away from it. They complained about the slippery floor to a man walking by, who looked like an employee¹. They continued dancing, at first on the carpeted area around the dance floor, but later returning to the dance floor, because it had become less crowded; by that time, Acevedo was dancing barefoot.

In moving for summary judgment dismissing the complaint, defendants contend that there is no evidence that they had actual or constructive notice of the alleged dangerous condition. Defendants emphasize that the slippery area about which plaintiff and her friend (or plaintiff and her husband) had complained to an employee earlier, was not the area where plaintiff's accident occurred. As to the spot where plaintiff fell, they contend that the alleged wet

¹ Plaintiff Lucio Bruner similarly testified at his deposition that he and Acevedo complained to an employee about the slippery floor.

condition was not caused or created by defendants, and was not shown to have been there long enough to establish that they had constructive notice. They also point out an inconsistency between plaintiff Acevedo's testimony that it was she and her friend Stephanie who had complained earlier to an employee – and that she complained only that one time – and Lucio Bruner's testimony that he and Acevedo had complained to an employee about a wet condition on the floor, approximately two hours before Acevedo's slip and fall.

Additionally, defendants submit the deposition testimony and affidavit of the owner of Mulino's, Louis Gigante, who testified that the entire staff is trained to look for spillage on the dance floor and the carpeted area surrounding the dance floor, and to monitor and housekeep, as necessary. Before plaintiff left Mulino's, Gigante stated, he spoke with her and asked her "Are you okay?," to which plaintiff replied "I'm fine." He asserted that at that time, plaintiff was walking on her own, without assistance. Although Mulino's maintains incident report logs, no such report was created for the alleged incident since plaintiff was visibly not injured or hurt.

Gigante testified that he spoke with his general manager, John Gervasi, who he said had witnessed plaintiff's accident, and that Mr. Gervasi had checked the dance floor after plaintiff fell and did not see any condition to remedy; no affidavit by Gervasi is offered on the motion.

Mulino's banquet manager, Drana Ulaj, testified that she did not witness the accident, but observed plaintiff dancing erratically on the dance floor as Ulaj was standing on the side/perimeter of the dance floor.

With regard to the claim against the Town of Eastchester, defendants submit a licensing agreement between the Town, which owns the Lake Isle Country Club in which Mulino's is located, and Eastchester Events, Inc., authorizing the operation of the Mulino's facility. The general manager of the country club, George Papademetriou, stated in his affidavit that the Town

of Eastchester has no responsibility for Mulino's, and testified at his deposition that he has no responsibility for operating or inspecting Mulino's.

In opposition, plaintiffs rely on Acevedo's testimony identifying the cause of her fall as liquid on the floor, establishing that a complaint was made earlier in the night about liquid on the floor, and the lack of evidence from defendants establishing that reasonable inspections were made of the floor.

Plaintiffs also submit affidavits from individuals who were present at Mulino's that night with them. Alessandro Ruggiero stated in his affidavit that "Patrons were drinking on the dance floor of Mulino's," going on to suggest that based on that observation, it was possible that drinks were spilled. Christie McCloskey stated that she and Acevedo "originally danced in front of the DJ booth, but . . . moved to the area between the carpet and dance floor because there was a liquid on the dance floor," and that "[t]hroughout the night there was liquid at different locations on the floor.

As to the Town's effort to shift liability based on the Licensing Agreement, plaintiffs argue that because the Town owns the property where the accident occurred, it has a non-delegable duty to maintain a safe premises.

Analysis

When defendants move for summary judgment, it is their initial burden to make a showing that, if unrebutted, establishes that they are entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). In a negligence action, a plaintiff must establish a duty of care, a breach of that duty, an injury and that the breach was a proximate cause of that injury (*see Akins v Glens Falls City Sch. Dist.*, 53 NY2d 325,333 [1981]). Property owners and their agents have a duty to maintain their premises in reasonably safe condition (*see*

Basso v Miller, 40 NY2d 233, 241 [1976]).

Liability may only be imposed on the property owner or manager for failure to remedy a dangerous condition if they created the condition, or had actual or constructive notice of it (*see Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]; *Batiancela v Staten Island Mall*, 189 AD2d 743, 743 [2d Dept 1993]). Actual notice must be based on evidence that the condition that caused the accident was known to, or brought to the attention of the defendant or defendant's employees or agents in enough time to remedy it. "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Initially, this Court rejects defendants' suggestion that plaintiff cannot identify the cause of the accident, and that therefore the action must be dismissed (citing, *e.g.*, *Antelope v Saint Aidan's Church, Inc.*, 110 AD3d 1020, 1021 [2d Dept 2013]). Nor have defendants established a right to relief based on their contention that plaintiff was the sole proximate cause of her injuries, in reliance on *Ascher v Scarsdale Sch. Dist.* (267 AD2d 339, 339 [2d Dept 1999]).

"A defendant who moves for summary judgment in a slip-and-fall or trip-and-fall case has the initial burden of making a prima facie showing that it did not create the hazardous condition which allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it" (*Campbell v New York City Tr. Auth.*, 109 AD3d 455, 456 [2d Dept 2013]). While defendants correctly contend that there is no evidence establishing, or permitting the inference, that they either created or had actual notice of the particular alleged wet condition on which Acevedo fell, they have failed to establish a lack of constructive notice as a matter of law. Although constructive notice of a particular wet spot

may not be inferred “in the absence of proof as to how long a puddle of water was on the floor” (see *Paciello v May Dept. Stores Co.*, 263 AD2d 533 [2d Dept 1999]; see *McDuffie v Fleet Fin. Grp., Inc.*, 269 AD2d 575, 575 [2d Dept 2000]), plaintiffs do not rely solely on the single wet spot. They offer testimony to the effect that there was at least one other wet spot, about which defendants were notified, as well as evidence that patrons were permitted to carry drinks onto the dance floor, and that there were other wet spots on the floor that night.

Defendants have not offered affirmative evidence “as to when the accident site was last cleaned or inspected prior to the injured plaintiff’s fall” (*Barris v One Beard St., LLC*, 126 AD3d 831, 832 [2d Dept 2015], citing *Campbell v New York City Tr. Auth., supra*). Nor do their submissions eliminate any issue of fact regarding constructive notice, based on repeated spills during that night. Although typically, the rule that “[a] party . . . who has actual knowledge of an ongoing and recurring dangerous condition can be charged with constructive notice of each specific reoccurrence of that condition” (see *Kohout v Molloy College*, 61 AD3d 640, 642 [2d Dept 2009]) applies to conditions that regularly reoccur over an extended period of time, the evidence of a recurring problem with spills that night, as well as an assertion that people on the dance floor were holding drinks, may form the basis for an inference that defendants had constructive notice of the particular condition on which Acevedo fell.

Crawford v AMF Bowling Centers, Inc. (18 AD3d 798 [2d Dept 2005]) is distinguishable. There, the plaintiff had complained of a wet condition on one previous occasion, and the court held that “[a] general awareness that patrons might spill their drinks in the carpeted area is insufficient to constitute notice of the particular condition that caused the plaintiff’s fall” (18 AD3d at 799). The evidence submitted by plaintiffs here establishes more than grounds for such a general awareness; if accepted, it is sufficient to permit the inference that defendants had

constructive notice of spills on the dance floor.

Finally, defendants' submission of the Town's Licensing Agreement for the premises fails to provide a basis for dismissal of the complaint as against the Town. An agreement granting a license to use premises is not a leasehold interest, thus, "the standard applied to out-of-possession landlords is inapplicable here" (*see Agbosasa v City of New York*, 168 AD3d 794, 796 [2d Dept 2019]).

Based upon the foregoing, it is hereby,

ORDERED that defendants' motion for an order dismissing the complaint is denied; and it is further

ORDERED that all parties appear in the Settlement Conference Part on Tuesday, April 21, 2020 at 9:15 a.m., at the Westchester County Courthouse located at 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York, 10601.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
March 6, 2020


HON. TERRY JANE RUDERMAN, J.S.C.