Mich v Vintage Steakhouse, Inc.
2020 NY Slip Op 34706(U)
December 7, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 603139/2017
Judge: Vincent J. Martorana
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

SHORT FORM ORDER

INDEX No. 603139/2017
CAL. No. 201902542OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 23 - SUFFOLK COUNTY

PRESENT:

Hon. VINCENT J. MARTORANA
Justice of the Supreme Court

MOTION DATE 6/25/20
ADJ. DATE 9/17/20
Mot. Seq. # 001 - MD
Mot. Seq. # 002 - MG

----------X

KATHLEEN M. MICH and WILLIAM J. MICH, JR.,

Plaintiffs,

- against -

VINTAGE STEAKHOUSE, INC., DELMONICO'S PORTERHOUSE, LLC, and AMELIA ASSOCIATES, INC.,

Defendants.

----------X

GLYNN MERCEP & PURCELL, LLP
Attorney for Plaintiffs
North Country Road, P.O. Box 712
Stony Brook New York 11790

GANNON, ROSENFARB & DROSSMAN
Attorney for Defendant Vintage Steakhouse
3 Huntington Quadrangle, Suite 201-S
Melville, New York 11747

MARTYN, MARTYN, SMITH & MURRAY
Attorney for Defendant Amelia Associates
150 Motor Parkway, Suite 405
Hauppauge, New York 11788

Upon the following papers read on these motions for summary judgment: Notice of Motion and supporting papers by defendant Amelia Associates, dated April 20, 2020; Notice of Cross Motion and supporting papers by defendant Vintage Steakhouse, LLC, dated May 19, 2020; Answering Affidavits and supporting papers by plaintiffs, dated September 3, 2020; Answering Affidavits and supporting papers by plaintiffs, dated September 3, 2020; Replying Affidavits and supporting papers by defendant Amelia Associates, dated September 16, 2020; Replying Affidavits and supporting papers by defendant Vintage Steakhouse, LLC, dated September 16, 2020; it is

ORDERED that the motion (seq. 001) by defendant Amelia Associates and the motion (seq. 002) by defendant Vintage Steakhouse, LLC, are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendant Amelia Associates for summary judgment dismissing the complaint and cross claims against it is denied; and it is further

ORDERED that the motion, incorrectly denominated a cross motion, by defendant Vintage Steakhouse, LLC, for summary judgment dismissing the complaint and cross claims against it is granted.

This action was commenced by plaintiff Kathleen M. Mich to recover damages for injuries she allegedly sustained on April 18, 2014, when she tripped and fell on the sloped portion of a curb cut in the sidewalk in front of Vintage Steakhouse, located at 433 North Country Road, St. James, New York. By their bills of particulars, plaintiffs claim, inter alia, that defendants negligently failed to mark the subject curb cut. Mrs. Mich's husband,

plaintiff William J. Mich, Jr., asserts a derivative claim for loss of services. Defendant Vintage Steakhouse, LLC, asserts cross claims against defendant Amelia Associates, i/s/h/a Amelia Associates, Inc., for contribution, common law, and contractual indemnification, as well as breach of contract. Amelia Associates asserts the same cross claims against defendants Vintage Steakhouse, LLC, and Delmonico's Porterhouse, LLC (Delmonico's). Delmonico's allegedly is the former name of Vintage Steakhouse, LLC.

Amelia Associates (Amelia) now moves for summary judgment in its favor, arguing that the alleged defective condition was not defective, but open, obvious, and not inherently dangerous. It also argues that it had no actual or constructive notice of any defective condition. In support of its motion, Amelia submits, among other things, transcripts of the parties' deposition testimony, a copy of a certificate of occupancy, a copy of a site plan, and two photographs.

Vintage Steakhouse, LLC (Vintage) also moves for summary judgment in its favor, arguing that no defective condition is present, and that the curb cut was open and obvious and not inherently dangerous. It further argues that even if a defective condition was present, by the terms of its lease agreement with Amelia it had no duty regarding the area where the incident allegedly occurred. In support of its motion, Vintage submits, among other things, transcripts of the parties' deposition testimony, six photographs, and a copy of a lease between Amelia and Delmonico's.

Kathleen Mich testified that at approximately 7:00 p.m. on the date in question, she and her husband parked their motor vehicle in an asphalt lot near the Vintage Steakhouse. Specifically, she explained that they parked in front of a store in a strip mall immediately adjacent to the restaurant. She indicated that the weather was sunny and dry. Mrs. Mich stated that upon exiting their vehicle, she and her husband stepped from the parking lot up onto an approximately 4-foot-wide concrete sidewalk that ran along the front of the strip mall's stores. She testified that she had been walking closer to the curb edge of the sidewalk than her husband, who walked closer to the storefronts. Asked to describe the entrance to the Vintage Steakhouse, Mrs. Mich stated that it had a number of concrete steps leading to its doorway, which was to her right as she walked. To her left, however, directly in front of the entrance steps, was a sloped curb cut leading down to the black asphalt parking lot. She indicated that her leftward positioning on the sidewalk placed her in close proximity to the curb cut, and that a car was parked directly in front of it, perpendicular to the curb. Upon questioning, she stated that while she did not see the curb cut, nothing physically obstructed her view thereof. Mrs. Mich testified that as she walked, her left foot slipped down the slope of the curb cut, causing her to fall to the ground.

Eric Neitzel testified that he is one of eight partners who own Amelia, which is the general partnership that owns the subject premises. He stated that Amelia entered into a 20-year lease with Delmonico's in the year 2000. Mr. Neitzel indicated that at the time it executed the lease agreement Delmonico's was doing business as Vintage, and that he does not know if Vintage was ever incorporated. He testified that prior to Delmonico's taking possession of the subject premises, various renovations were completed by Amelia, including the construction of the subject sidewalk in front of the restaurant. Mr. Neitzel stated that during construction of such sidewalk, Amelia was required, pursuant to a site plan approved by the Town of Smithtown (the Town), to create a sloping area to accommodate patrons in wheelchairs entering the sidewalk from the parking lot, which it did. Subsequent to the sidewalk's construction, the Town granted Amelia a certificate of occupancy. Upon questioning, Mr. Neitzel acknowledged that while there were no painted lines near the sloped sidewalk area to prevent vehicles from parking in front of it, the Town approved the parking lot's striping scheme. He further testified that the subject sidewalk has not been altered since Amelia had it installed.

Michael Cacaro testified that he is the majority owner of Vintage, and that while he obtained the lease to the building under the name of Delmonico's, Vintage has been subject to the terms of the original lease since the restaurant's inception. Mr. Cacaro indicated that Vintage's landlord, Amelia, installed the subject sidewalk prior to Vintage taking possession of the restaurant building, but that it was his understanding that Vintage had a contractual duty to keep it free from snow and debris. He further indicated that no repairs were made in the period between the sidewalk's installation and the time of Mrs. Mich's alleged incident.

The lease agreement, submitted as evidence by both movants in support of their motions, defines the "premises" as "approximately 2,791 square feet of gross leasable area as cross-hatched on Exhibit A." Upon viewing Exhibit A of the lease agreement, a map of the subject premises and more, the cross-hatched area covers only the footprint of Vintage's restaurant building– not the subject sidewalk. The lease further provides, in section 8.02, that Amelia shall maintain the "Common Area," which it defines, in relevant part, as "all areas and space provided by [Amelia] for the common or joint use of all tenants in the Entire Shopping Center . . . including, without limitation, parking areas, access roads, driveways . . . pedestrian walks, outside courts, and curb cuts . . . and all other non-leasable portions of the Shopping Center."

A party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (see ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient to raise a triable issue (see ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (see ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157, 159 [2011]).

The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (see ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Milewski v Washington Mut., Inc.***, 88 AD3d 853, 931 NYS2d 336 [2d Dept 2011]). In a premises liability case, a defendant real property owner who moves for summary judgment "has the burden of making a prima facie showing that it neither (1) affirmatively created the hazardous condition nor (2) had actual or constructive notice of the condition and a reasonable time to correct or warn about its existence" (***Parietti v Wal-Mart Stores, Inc.***, 29 NY3d 1136, 1137, 61 NYS3d 523 [2017]; see ***Gani v Ave. R Sephardic Congregation***, 159 AD3d 873, 72 NYS3d 561 [2d Dept 2018]). However, a property owner "has no duty to protect or warn against conditions that are open and obvious and not inherently dangerous" (***Masker v Smith***, ___AD3d___, 2020 NY Slip Op 06519 [2d Dept 2020]). Whether a dangerous condition exists on real property "depends on the particular facts and circumstances of each case and is generally a question of fact for the jury. Whether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances, [and] [e]ven a condition that is generally apparent to a person making reasonable use of their senses may be rendered a trap . . . where the condition is obscured or the plaintiff is distracted" (***Elfassi v Hollister Co.***, 167 AD3d 569, 570, 88 NYS3d 505 [2d Dept 2018] [internal citations and quotations omitted]).

Here, the Court finds Amelia failed to establish a prima facie case of entitlement to summary judgment in its favor (see ***Shermazanova v AmeriHealth Med., P.C.***, 173 AD3d 796, 103 NYS3d 160 [2d Dept 2019]; ***Dalton v N. Ritz Club***, 147 AD3d 1017, 46 NYS3d 900 [2d Dept 2017]; ***Shah v Mercy Med. Ctr.***, 71 AD3d 1120, 898 NYS2d 589 [2d Dept 2010]; ***Silberstein v City of New York***, 7 AD3d 692, 776 NYS2d 520 [2d Dept 2004]); see

also ***Monopoli v Food Emporium, Inc.***, 135 AD3d 716, 23 NYS3d 322 [2d Dept 2016]; see generally ***Alvarez v Prospect Hosp.***, supra). The evidence submitted in support of its motion was insufficient to meet its burden of demonstrating that the alleged defective condition was open and obvious and not inherently dangerous (see ***Holmes v Macy's Retail Holdings, Inc.***, 184 AD3d 811, 124 NYS3d 582 [2d Dept 2020]). In this case, plaintiffs do not allege that the concrete sidewalk in question was damaged or covered by debris. Rather, plaintiffs allege that the design, implementation, and failure to mark a handicapped-accessible sidewalk ramp was a defective condition, constituting a trap. Testimony of Amelia's representative, Mr. Neitzel, confirmed that it owned the situs of Mrs. Mich's alleged fall, and that it installed the sidewalk ramp in controversy. Notwithstanding the commonplace nature of similar curb cuts or ramps, the circumstances of this particular iteration, including its placement, unmarked, in an area of high foot traffic, at the head of a parking space in which a vehicle was parked at the time in question, leave triable questions outstanding regarding its danger (see ***Elfassi v Hollister Co.***, supra; see also ***Buonchristiano v Fordham Univ.***, 146 AD3d 711, 46 NYS3d 76 [1st Dept 2017]). Such determinations are within the purview of the finder of fact. Furthermore, while Amelia argues that the Town's issuance of a certificate of occupancy implicitly sanctioned the sidewalk design, the site plan documents offered as exhibits do not depict the curb cut in question. Nevertheless, possession of a certificate of occupancy is not determinative proof that no defective conditions are present at a premises. Amelia having failed to meet its prima facie burden, the Court need not consider plaintiffs' papers in opposition (see generally ***Winegrad v New York Univ. Med. Ctr.***, supra). Accordingly, the motion by defendant Amelia for summary judgment dismissing the complaint and cross claims against it is denied.

Vintage, however, established a prima facie case of entitlement to summary judgment in its favor as to plaintiffs' complaint and Amelia's cross claims. Through its submissions, Vintage demonstrated that it did not own, construct, control, or have a duty to maintain that portion of the subject premises where Mrs. Mich's incident allegedly occurred (see ***Athenas v Simon Prop. Group, LP***, 185 AD3d 884, 128 NYS3d 284 [2d Dept 2020]). In opposition to Vintage's motion, plaintiffs argue that it "had, at the very least, overlapping responsibility with respect to safeguarding the sidewalk for its patrons." Plaintiffs submit, among other things, transcripts of the parties' deposition testimony, an affidavit of Town of Smithtown Planning Director Peter Hans, an affidavit of accident reconstruction expert James Pugh, a copy of the lease agreement, and five photographs. Plaintiffs' submissions fail to raise a triable issue. Specifically, plaintiffs fail to cite any legal basis for Vintage's alleged duty to alter the subject sidewalk in light of Amelia's ownership of the premises, creation of the alleged defective condition, and contractual duty to maintain the common areas of the subject premises. Plaintiffs' reliance upon "Tenant's Obligations" in section 11.02 of the lease agreement, which makes reference to "sidewalks" is misplaced, as such section applies only to the "Premises," which, as defined on the second page of the lease, and delineated on the map appended thereto, covers only the area within the walls of the Vintage restaurant (see generally ***Monopoli v Food Emporium, Inc.***, supra). Accordingly, the motion by defendant Vintage for summary judgment dismissing the complaint and cross claims against it is granted.

Dated: Riverhead, New York
December 7, 2020

VINCENT J. MARTORANA, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION