Nicholson v M.C. & E.D. Beck Inc.
2021 NY Slip Op 33642(U)
June 10, 2021
Supreme Court, Orange County
Docket Number: Index No. EF004901-2019
Judge: Catherine M. Bartlett
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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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TAISHAWN A. NICHOLSON,

Plaintiff,

-against-

M.C. & E.D. BECK INC. d/b/a P & G's RESTAURANT,

Defendant.

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To commence the statutory time period 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.

Index No. EF004901-2019

Motion Date: May 10, 2021

The following papers numbered 1-7 were read on Defendant's motion for summary judgment dismissing the complaint:

Notice of Motion - Affirmation / Exhibits - Affidavit - Memorandum 1-4

Affirmation in Opposition / Exhibits - Memorandum 5-6

Reply Affirmation 7

Upon the foregoing papers, it is ORDERED that the motion is disposed of as follows:

A. Factual Background

This is an action to recover for personal injuries sustained by Plaintiff Taishawn Nicholson shortly after midnight on February 24, 2019 at P&G's Restaurant in New Paltz, New York. Plaintiff and his friend Marco Lopez went to P&G's late in the evening on February 23rd. Upon entering the premises, the bar is to the left, an area with dining tables is to the right, and a

[* 1] Filed in Orange County 06/10/2021 10:49:04 AM $0.00 Bk: 5136 Pg: 1678 Index: # EF004901-2019 Clerk: DK

dance floor is straight back from the entrance. The dance floor is elevated slightly and is accessed by two ramps, one on the bar side and one on the dining side. Plaintiff bought himself a drink and went up to the dance floor. About 30 minutes before his accident, he heard glass breaking on the dining side of the restaurant.[1] Some time later, he was asked to dance and went to put his drink down. As he was walking down the dining-side ramp, he felt "off balance" as if something were stuck on the bottom of his left shoe. He flexed his leg and swiped at the bottom of his shoe with his left hand to knock it off. As Plaintiff continued walking, he realized that whatever was stuck to his shoe was still there, and noticed that his finger was bleeding. He scraped his shoe on the ground and was able to dislodge a piece of clear, curved glass, an inch long and inch or inch and a half wide, which appeared to have come from a bottle. Plaintiff approached a P&G "bouncer", who inspected Plaintiff's wound, opined that the laceration in his finger was too deep for first aid, and advised him to go to the hospital. The laceration caused by the piece of glass required seven stitches to close.

B. Defendant's Motion for Summary Judgment

P&G moves for summary judgment on the purported grounds that (1) it neither created nor had notice of the broken glass which caused Plaintiff's injury, and (2) Plaintiff's action in blindly swiping at his shoe without first ascertaining what was stuck there was the sole proximate cause of injury. In support of its motion, Defendant proffers the affidavit of Michael Beck, the owner of P&G's at the time Plaintiff's accident occurred. Mr. Beck testified generally to P&G's

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[1] According to Plaintiff, his friend Marco advised him after the accident that he had complained to a bartender about the broken glass and asked if anyone was going to clean it, and was told "it's too busy." However, Plaintiff has proffered neither Marco's affidavit nor any excuse for the failure to obtain his friend's affidavit. Accordingly, the Court declines to consider this hearsay in determining Defendant's motion for summary judgment.

staffing and maintenance practices, but he was not present at the restaurant on the evening of February 23-24, 2019.[2]

C. Legal Analysis

1. Premises Liability

The liability of a property owner is measured by "the single standard of reasonable care under the circumstances." *Basso v. Miller,* 40 NY2d 233 (1976). The owner must act as a reasonable person in maintaining the property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk. *See, Peralta v. Henriquez,* 100 NY2d 139, 144 (2003). To establish a prima facie case of negligence, the plaintiff must demonstrate that the defendant created the dangerous condition that caused the accident or had actual or constructive notice of that condition and failed to remedy it within a reasonable time. *See, Gordon v. American Museum of Natural History,* 67 NY2d 836 (1986). A property owner may be found to have had constructive notice of a hazardous condition if it was visible and apparent and existed for a sufficient length of time prior to the accident to permit the owner to discover and remedy it. *See, id.*, 67 NY2d at 837. Where liability is predicated on the defendant's having created the hazardous condition, proof of notice is not required. *See, e.g., Johnson v. City of New York,* 102 AD3d 746, 748 (2d Dept. 2013); *Sermos v. Gruppuso,* 95 AD3d 985, 986 (2d Dept. 2012).

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[2]Mr. Beck was able to confirm Plaintiff's testimony that he spoke to P&G personnel after his accident. However, as the person to whom Plaintiff spoke made no report of the accident, surveillance camera videotape from the evening of the accident was neither viewed nor preserved. Mr. Beck further averred that the two P&G employees who would have been circulating in the restaurant that evening had been laid off due to Covid-related restrictions. However, he proffered no excuse for Defendant's failure to produce their affidavits in support of the motion for summary judgment.

2. The Standard Governing Summary Judgment

"The proponent of a summary judgment motion 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 from the case." *Winegrad v. New York University Medical Center,* 64 NY2d 851, 853 (1985). A defendant moving for summary judgment bears "the initial burden of establishing prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of its defense, rather than by pointing to gaps in the plaintiffs' evidence." *Wheaton v. East End Common Associates, LLC,* 50 AD3d 675, 677 (2d Dept. 2008). The movant's failure to meet this burden of proof "requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v. New York University Medical Center, supra.*

"To demonstrate entitlement to summary judgment, an owner of real property must establish that it maintained the premises in a reasonably safe condition, and that it did not create a dangerous or defective condition on the property or have actual or constructive notice of a dangerous or defective condition for a sufficient length of time to remedy it." *Reed v. 64 JWB, LLC,* 171 AD3d 1228 (2d Dept. 2019). *See, Milorava v. Lord & Taylor Holdings, LLC,* 133 AD3d 724, 725 (2d Dept. 2015); *Murray v. Banco Popular,* 132 AD3d 743, 744 (2d Dept. 2015); *Grib v. NYCHA,* 132 AD3d 725, 726 (2d Dept. 2015); *Jordan v. Juncalito Abajo Meat Corp.,* 131 AD3d 1012 (2d Dept. 2015); *Santiago v. HMS Host Corp.,* 125 AD3d 838 (2d Dept. 2015); *Paduano v. 686 Forest Avenue, LLC,* 119 AD3d 845 (2d Dept. 2014); *Cruz v. Rampersad,* 110 AD3d 669, 670 (2d Dept. 2013); *Valentin v. Shoprite of Chester,* 105 AD3d 1036 (2d Dept. 2013); *Babb v. Marshalls of MA, Inc.,* 78 AD3d 976 (2d Dept. 2010); *Zerilli v. Western Beef Retail, Inc.,* 72 AD3d 681 (2d Dept. 2010).

The defendant cannot meet this burden merely by pointing to gaps in the plaintiff's case, but must affirmatively demonstrate the merit of its defense. *See, Collado v. Jianco,* 126 AD3d 927, 928 (2d Dept. 2015); *Marielisa R. v. Wolman Rink Operations, LLC,* 94 AD3d 963 (2d Dept. 2012); *Rubistello v. Bartolini Landscaping, Inc.*, 87 AD3d 1003, 1005 (2d Dept. 2011); *Shafi v. Motta,* 73 AD3d 729, 730 (2d Dept. 2010). Accordingly, the Second Department has consistently held that, "[t]o meet its burden on the issue of lack of constructive notice, a defendant is required to offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall." *Milorava v. Lord & Taylor Holdings, LLC, supra,* 133 AD3d at 725. *See, e.g., Jordan v. Juncalito Abajo Meat Corp., supra,* 131 AD3d at 1012-13; *Marchese v. St. Martha's Roman Catholic Church,* 106 AD3d 881 (2d Dept. 2013); *Goodyear v. Putnam / Northern Westchester Bd. of Coop. Educ. Servs,* 86 AD3d 551, 552 (2d Dept. 2011); *Babb v. Marshalls of MA, Inc., supra,* 78 AD3d at 976; *Birnbaum v. New York Racing Association, Inc.*, 57 AD3d 598, 598-599 (2d Dept. 2008). As that Court observed in *Marchese v. St. Martha's Roman Catholic Church, supra*:

> To meet its initial burden on the issue of lack of constructive notice, a defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff tripped (*see Tsekhanovskaya v. Starrett City, Inc.*, 90 AD3d 909, 910...; *Pryzywalny v. New York City Tr. Auth.*, 69 AD3d at 599...). A defendant fails to satisfy its initial burden as to lack of constructive notice when it simply presents evidence of its general cleaning or inspection practices rather than providing specific evidence as to when the area in question was last cleaned or inspected prior to the plaintiff's fall (*see Jackson v. Jamaica First Parking, LLC,* 91 AD3d at 603...; *Pryzywalny v. New York City Tr. Auth.*, 69 AD3d at 599...; *Arzola v. Boston Props. Ltd. Partnership,* 63 AD3d at 656...; *Feldmus v. Ryan Food Corp.*, 29 AD3d 940, 941...).

Marchese, 106 AD3d at 881 (emphasis added).

3. Notice

On the record before the Court, Plaintiff's case hangs from a single thread, to wit, his deposition testimony that approximately thirty (30) minutes before his accident there was an audible breaking of glass in the vicinity of the ramp from the dance floor to the dining side of the restaurant. Defendant produced no evidence to contradict Plaintiff's claim, and in any event the Court must on Defendant's motion for summary judgment assume the truth of Plaintiff's testimony.

Viewing this evidence in the light most favorable to Plaintiff, and according him the benefit of every reasonable inference, a jury could reasonably infer from Plaintiff's hearing the glass breaking that P&G personnel would have heard it as well. Since sharp-edged broken glass would clearly constitute a hazard to P&G's patrons, the jury might also reasonably infer from evidence of the audible breaking of glass that P&G had actual notice of the existence of a hazardous condition on its premises.

AS P&G was legally obligated to maintain its property in a reasonably safe condition in view of all the circumstances (*see, Peralta v. Henriquez, supra*), it would at that point have been incumbent on P&G to undertake a reasonably prompt and thorough inspection to locate and remove the pieces of broken glass for the protection of its patrons. There is at the very least a triable issue of fact whether the thirty (30) minute interval between the glass breaking and Plaintiff's accident afforded P&G sufficient time to locate the broken glass and remedy the hazardous condition. *See, e.g., Negri v. Stop and Shop, Inc.*, 65 NY2d 625 (1985) (triable issue of fact where jury could find that broken jars of baby food had been present for more than 15 to 20 minutes); *Deluna Cole v. Tonali, Inc.*, 303 AD2d 186, 187 (1st Dept. 2003).

P&G is "chargeable with notice of the dangerous conditions which a reasonable inspection would have discovered." *See, Wynn v. TRIP Redevelopment Associates,* 296 AD2d 176, 181 (3d Dept. 2002) (citing *Monroe v. City of New York,* 67 AD2d 89, 96 [2d Dept. 1979]). *See also, Reed v. 64 JWB, LLC, supra*, 171 AD3d 1228, 1229 (2d Dept. 2019) (where defect is discoverable upon reasonable inspection, constructive notice may be imputed); *Ferris v. County of Suffolk,* 174 AD2d 70, 76 (2d Dept. 1992) (same); *Personius v. Mann,* 20 AD3d 616, 617 (3d Dept. 2005). The particular piece of glass which injured Plaintiff was small and clear, and in other circumstances constructive notice might well be deemed lacking as a matter of law. Here, however, where the evidence gives rise to a question whether P&G personnel heard the glass breaking and knew that it was there to be found, there is a triable issue of fact whether upon adequate inspection the broken glass would have been located and removed, thereby preventing Plaintiff's injury.

In view of the foregoing, P&G, to meet its initial burden on the issue of notice, was required to offer some evidence as to when the area in question was last cleaned or inspected relative to the time when Plaintiff's accident occurred. Evidence of its general maintenance or inspection practices, which is all P&G has proffered here, is insufficient to meet its burden. *See, e.g., Milorava v. Lord & Taylor Holdings, LLC, supra*; *Marchese v. St. Martha's Roman Catholic Church, supra*. As a matter of law, then, P&G has failed to demonstrate its *prima facie* entitlement to judgment as a matter of law on the issue of notice.

4. Causation

There is no direct evidence that the breakage which Plaintiff heard thirty (30) minutes before his accident in fact generated the piece of broken glass which caused his injury. Where

there are possible causes of injury for which the defendant would not be responsible, the proof must render those other causes sufficiently "remote" or "technical" to enable the jury to reach its verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence. *See, Gayle v. New York*, 92 NY2d 936 (1998). It is sufficient that facts and circumstances are shown from which causation may be reasonably inferred. *See, Burgos v. Aqueduct Realty Corp.*, 92 NY2d 544 (1998); *Derdiarian v. Felix Contracting Corp.*, 51 NY2d 308 (1980).

The evidence here shows that the onset of Plaintiff's problem with his shoe occurred as he was departing the dance floor via the ramp leading to the dining side of the restaurant, i.e., the area from which the sound of breaking glass had emanated. Had the piece of glass in question become lodged in his shoe at some earlier time and some other place, Plaintiff would presumably have noticed it, or so the jury could find. On the evidence here, then, there is a temporal and spatial connection between the breakage of glass on P&G's premises and the lodging of a piece of broken glass in Plaintiff's shoe, from which a finding of proximate cause may reasonably ensue.

Finally, P&G contends that Plaintiff's blindly swiping at his shoe without first ascertaining what was stuck there was an intervening or superseding cause and hence the sole proximate cause of injury. A defendant's liability in such a case turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by its negligence. If the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct, it may well

be a superseding act which breaks the causal nexus. *See, Hain v. Jamison,* 28 NY3d 524 (2016); *Derdiarian v. Felix Contracting Corp., supra.*

Plaintiff's effort to clear the foreign object that was stuck to his shoe was a normal and foreseeable consequence of the situation created by P&G's putative negligence in failing to clean up the broken glass on its premises. Moreover, the risk created by P&G's conduct – that of a patron's being cut by sharp-edged broken glass – was precisely the risk that materialized in a laceration of Plaintiff's finger. That Plaintiff attempted to clear his shoe by swiping his hand across the sole without first looking to ascertain what it was that was stuck there may well have been thoughtless and negligent, but it was not the kind of deliberate choice to encounter a known hazard that typically characterizes an intervening or superseding cause. On this record, then, P&G has not established that Plaintiff's action was so extraordinary or unforeseeable as to constitute an intervening or superseding cause as a matter of law.

D. Conclusion

Defendant having failed to establish prima facie entitlement to judgment as a matter of law on the issues raised in its motion papers, its motion for summary judgment must be denied regardless of the sufficiency of Plaintiff's opposing papers. *See, Winegrad v. New York University Medical Center, supra.*

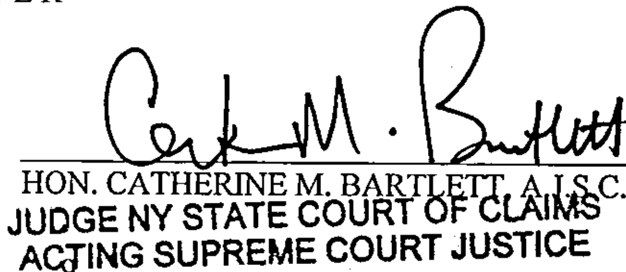
It is therefore

ORDERED, that Defendant's motion for summary judgment is denied.

The foregoing constitutes the decision and order of the Court.

Dated: June 10, 2021
Goshen, New York

E N T E R



HON. CATHERINE M. BARTLETT, A.J.S.C.
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE