

Sheahan v Arte Cafe

2023 NY Slip Op 32247(U)

July 5, 2023

Supreme Court, New York County

Docket Number: Index No. 154395/2018

Judge: Lori S. Sattler

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 02TR

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KATHLEEN SHEAHAN,	INDEX NO.	<u>154395/2018</u>
Plaintiff,	MOTION DATE	<u>07/11/2022</u>
- v -	MOTION SEQ. NO.	<u>002</u>
ARTE CAFE, NEW YORK CITY RESTAURANT GROUP, WESTSIDE TOMATO, INC. D/B/A ARTE CAFE		
Defendant.	DECISION + ORDER ON MOTION	

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HON. LORI S. SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74

were read on this motion to/for JUDGMENT - SUMMARY.

In this premises liability action, defendant Westside Tomato, Inc. d/b/a Arte Café (“Westside”) moves for an order granting summary judgment dismissing plaintiff Kathleen Sheahan’s (“Plaintiff”) Verified Complaint as against it pursuant to CPLR 3212. Plaintiff opposes the motion.

Plaintiff alleges that she was injured after falling on a single stair separating the dining room and bar areas at the Arte Café restaurant located at 106 West 76th Street in Manhattan (“the premises”) on September 16, 2017. She claims that Westside, the owner and operator of the Arte Café restaurant, is also the owner of the premises.

According to her testimony, Plaintiff was in the dining area of Arte Café when she got up to find a restroom. She proceeded to walk through the doorway that separates the dining and bar areas. She maintains that she had never used this doorway and was unaware of the height difference between the dining room and bar area, as she had accessed the dining room through a

different doorway on the day of the accident and on all prior visits to Arte Café. Plaintiff recalled that she was looking straight ahead for a restroom and had no reason to believe that she needed to look down, as she had no reason to believe that there was a stair in the doorway. A picture of the area of the accident shows that the dining room floor is black and white tile, the bar floor is wood, and the lip at the top of the stair between the dining room and bar is a similar type of wood to that in the bar (NYSCEF Doc. No. 49). Although the photographs show metal handrails on either side of the door, Plaintiff contends that she did not see them the night of her accident. She also testified that there were no signs warning about the stair in the vicinity of where she fell (NYSCEF Doc. No. 48, Plaintiff EBT at 84)

Westside denies that it owned the premises at the time of the accident and that nonparty 106-108 West 73rd Street Associates LLC (“106-108 West”) was the owner. Its principal, Robert Malta, testified that it leased the premises from “an entity” but that he could not recall its name (NYSCEF Doc. No. 50, Malta EBT at 13-14). It further maintains that it was only required to make nonstructural repairs to the premises, per its lease with 106-108 West and that work on the stairs would have constituted a “structural repair” outside of its responsibilities. Westside does not annex a copy of the lease to its moving papers.

Malta testified that warning signs were “always there” in the vicinity of Plaintiff’s accident, “maybe on the other side of the dining room” on a wall (*id.* at 43-44). He was unable to recall their exact location or wording. Malta also testified that tape had always been placed on the upper edge of the stair and that it would always be replaced by Arte Café employees after it was worn out (*id.* at 46-47). He was unable to recall what the tape looked like or if he had seen it but stated that it would get worn out when the restaurant floors were cleaned.

Westside now moves for summary judgment dismissing Plaintiff's Verified Complaint against it, arguing that the stair was not defective as a matter of law. It also contends that it owed no duty to Plaintiff as it did not create or have actual or constructive notice of a defective condition and that any defective condition related to the stair would have been structural in nature and therefore outside of the purview of its responsibilities under the lease.

On a motion for summary judgment, a movant 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 [1986]). After the movant makes this showing, "the burden shifts to the party opposing the motion . . . to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact" such that trial of the action is required" (*id.*). The Court must view the facts "in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

Property owners and lessees owe a duty to exercise reasonable care in maintaining its property in a reasonably safe condition under the circumstances (*Powers v 31 E 31 LLC*, 24 NY3d 84, 94 [2014]; *Tagle v Jakob*, 97 NY2d 165, 168 [2001]). This duty requires that owners and lessees warn of "latent hazards" on the premises but not "open and obvious" dangers (*Tagle*, 97 NY2d at 169 [2001]). "While the issue of whether a hazard is latent or open and obvious is generally fact-specific and thus usually a jury question . . . a court may determine that a risk was open and obvious as a matter of law when the established facts compel that conclusion . . . and may do so on the basis of clear and undisputed evidence" (*id.* [internal citations omitted]). "A condition that is visible to one 'reasonably using his or her senses' is not inherently dangerous" (*Langer v 116 Lexington Ave., Inc.*, 92 AD3d 597, 599 [1st Dept 2012], quoting *Tagle*, 97 NY2d


at 170). “[A] step may be dangerous where the conditions create ‘optical confusion – the illusion of a flat surface, visually obscuring the step’ (*Langer*, 92 AD3d at 599, quoting *Brooks v Bergdorf-Goodman Co.*, 5 AD2d 162, 163 [1st Dept 1958]; see also *Saretsky v 85 Kenmare Realty Corp.*, 85 AD3d 89 [1st Dept 2011]).

Here, Westside fails to meet its prima facie burden of establishing a lack of dispute of material facts as to whether the stair was a dangerous or defective condition and whether it violated any duty it owed to Plaintiff in relation to the stair. The evidence submitted by Westside contains conflicting accounts about the presence and visibility of warning signs in the vicinity of the doorway between the dining room and bar area and the presence of tape on the edge of the stair at the time of Plaintiff’s fall. Malta testified that warning signs were posted somewhere in the dining area near the stair, while Plaintiff stated that she did not see any signs before she fell. Although Malta stated that there was “always” tape on the edge of the stair and that it was replaced when it was worn out, the photographic exhibits to Plaintiff’s EBT, taken some time after her accident, do not show tape in that area. Furthermore, as Plaintiff’s photographs show that the wooden edge of the step is a similar in color and texture to the bar floor, there is an issue of fact as to whether her accident could have arisen from optical confusion.

Accordingly, it is hereby:

ORDERED that the motion is denied.

7/5/2023
DATE


LORI S. SATTLER, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED
<input type="checkbox"/>	SETTLE ORDER	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: