

Osborne v Eighth Ave. H & Y Duet, Inc.

2025 NY Slip Op 35172(U)

September 18, 2025

Supreme Court, Bronx County

Docket Number: Index No. 23915/2020E

Judge: Laura G. Douglas

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Index No. 23915/2020E

CARL OSBORNE,

Plaintiff,

-against-

EIGHTH AVENUE H & Y DUET, INC. d/b/a
KARAOKE DUET 53, 53 H & Y DUET, LLC, and
YOUNG KEE HAM,

Defendants.

DECISION/ORDER

Present:
Hon. Laura G. Douglas
J. S. C.

Part 6

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion for summary judgment (seq. no. 2):

<u>Papers</u>	<u>Numbered</u>
Defendants’ Notice of Motion, Affirmation of Gwyneth K. Murray-Nolan, Esq. dated May 1, 2025 in Support of Motion, Memorandum of Law by Gwyneth K. Murray-Nolan, Esq. dated May 1, 2025 in Support of Motion, and Exhibits (“A” through “E”).....	1
Affirmation of Exceptional Circumstances by Gwyneth K. Murray-Nolan, Esq. dated May 28, 2025 and Exhibit (“A”).....	2
Affirmation of James A. Domini, Esq. dated July 9, 2025 in Opposition to Motion, Plaintiff’s Counter-Statement of Material Facts by James A. Domini, Esq. dated July 9, 2025, and Exhibit (“A”).....	3
Reply Affirmation of Gwyneth K. Murray-Nolan, Esq. dated July 24, 2025.....	4

Upon the foregoing papers and after due deliberation, the Decision/Order on this motion is as follows:

The defendants (collectively, “Karaoke Duet”) seek summary judgment pursuant to CPLR 3212 dismissing the plaintiff’s complaint in its entirety. The motion is denied.

The plaintiff (“Osborne”) seeks monetary damages for personal injuries purportedly sustained on March 29, 2017 when he fell down a set of stairs located within the building where Karaoke Duet leased certain space to operate a karaoke bar. Osborne was making a delivery of soda to the bar at the

time. Karaoke Duet contend that they did not own, lease, control, maintain, or clean those stairs, describing the location as a common staircase leading to their leased space.

Initially, the Court will excuse the late filing of this motion on account of counsel's illness during the relevant period (*see Freire-Crespo v. 345 Park Avenue L.P.*, 122 AD3d 501 [1st Dept 2014]).

The defendants rely on the deposition testimony of defendant Young Kcc Ham ("Ham"). Ham testified that he owned H & Y Duet, which leased a portion of the building to operate its business. In pertinent part, Ham testified as follows:

Q: My next question is how many stairways are there in the karaoke bar?

A: In the karaoke bar just one stair.

Q: Is there a different staircase for deliveries?

A: Yes.

Q: So, did Uttam tell you that the accident happened at or on the staircase where the deliveries are made?

A: Yes.

and

Q: What is downstairs?

A: I'm sorry, downstairs is the place for karaoke.

Q: Okay, is downstairs where the deliveries go?

A: Yes.

Q: So are there refrigerators downstairs?

A: Yes, yes.

Q: Are there sinks downstairs?

A: Yes.

Q: Do they do any food prep downstairs?

A: Only if it's simple.

Q: Is there a freezer downstairs?

A: Yes.

and

Q: So, was there somebody who had the responsibility to tell the delivery person where to bring the deliveries?

A: At this time, yes.

Q: Who was the person that would tell the delivery people where to bring the deliveries?

A: Well, the person who worked at my place there, yes.

and

Q: Was the manager supposed to open the doors so that the delivery person can go into that door that's on the right?

A: Yes, yes, the door is always closed. Only when the delivery come, either Hiroshi or any other employee open the door for the delivery.

Q: How does it stay open?

A: We open the door only when the delivery come in. And after the delivery is finished we just close the door.

Q: Does the door stay open while the delivery is being made?

A: Yes, the door was open while the delivery is processing.

Q: The question was how does it stay open?

A: We open the door when the delivery men come. And the delivery men would keep the door open and then after he finished, he closed the door and then leave. Then we check to make sure the door is closed.

Q: Did the door stay open while the delivery is being done? Does somebody have to hold it? Does somebody put a rock against to it? How does it stay open?

A: Well, we use sort of like a stick that we put between the door and frame to keep the door open.

and

Q: Does the manager make sure that the steps are clean and dry before delivery person starts taking down the items?

A: Yes, we checked but there is no water there, no.

As to his lease agreement, Ham testified that the landlord put certain hashmarks on the incorporated floor plan outlining the demised premises. Ham did not believe that the subject stairwell was included in that space. He admitted that the karaoke bar had been using that stairwell to receive deliveries of heavy items, such as beverages. However, he could not recall if the landlord had instructed him to use that stairwell for deliveries. Finally, Ham stated that the delivery door is only opened when deliveries are announced.

The defendants also offer Osborne's deposition testimony. Osborne testified that he was making

a delivery of soda to the karaoke bar at about 2:00 a.m. It was raining at the time. He had not been to the karaoke bar prior to his accident. In pertinent part, Osborne testified as follows:

Q: So when you arrived at Karaoke Duet on March 29, 2017, what did you do?

A: Made contact with one of the employees. I don't know if he was the manager or -- but we made contact with one of the employees.

Q: And the employee would tell you where to make the delivery?

A: Correct. They'll point to the store location. Tell us to go here or there.

Q: And where were you told to make the delivery at Karaoke Duet?

A: At a service entrance downstairs.

Q: And what -- can you describe the entrances to Karaoke Duet? Was there more than one?

A: There's two.

Q: Okay. And tell me what the difference is between the two entrances. You just --

A: Patrons, delivery.

Q: There's a patrons entry and a delivery entry?

A: Correct.

Q: So which entrance did you initially go to to get the instructions?

A: Patrons.

Q: And that's where you located the manager, or whoever it was, to tell you where to go?

A: Correct.

Q: And then where is the delivery entrance located as opposed to the patron entrance?

A: They're side by side.

and

Q: I just want to take it one step at a time. Who opened the door?

A: It was already opened.

Q: The door was propped open?

A: I believe it was. Once we made contact, the patron [sic] usually opens the door. But it was open.

Q: Okay. So you take your lead foot, which is your right foot?

A: Correct.

Q: And do what?

A: I put -- you push the hand truck down (indicating), down one stair, and then the other foot follows it.

Q: Okay.

A: Once we went down the first stair, I slipped and went down the stairs with the products.

The defendants contend that this evidence demonstrates that they did not owe a duty of care to Osborne because the staircase was specifically excluded from the demised premises, as depicted in the floor plan annexed to the lease. They maintain that the landlord, and not Karaoke Duet, retained control and maintenance obligations for these stairs, since the lease provides as follows:

“Landlord reserves the right to control and operate the public portions of the Building, the public facilities, as well as facilities for the common use of the Tenants”.

Finally, the defendants argue that they made no special use of these stairs.

In opposition, Osborne argues that the defendants have failed to set forth a *prima facie* showing that summary judgment is warranted and, in any event, triable issues of fact remain concerning whether the subject staircase did form part of the space leased to Karaoke Duet and whether it made special use of the stairs such that it incurred a duty of care for their condition.

Osborne points out that he was directed to use these stairs by Karaoke Duet staff and that the delivery door was propped open by a Karaoke Duet employee. The subject stairs lead down to the basement, which was part of Karaoke Duet’s demised premises and contained equipment used exclusively in Karaoke Duet’s business, such as a freezer and sink.

Osborne further notes that the lease gave Karaoke Duet the right to use the entrances to the premises for ingress and egress. The lease also obligated the defendants to keep the stairways free of any encumbrances. In addition, Osborne notes that the lease does not require all deliveries to Karaoke Duet to be made via the subject stairs. Osborne highlights that Ham was not sure who was responsible for maintaining and cleaning this delivery staircase (*see* Ham deposition transcript, p. 41, ll. 24-25, p. 42, ll. 1-3). As to the floor plan, Osborne contends that it does not conclusively reveal that the subject stairs were not encompassed within the demised premises.

Finally, Osborne references his following deposition testimony -

Q: Mr. Osborne, when you were stopped midway down the stairs, can you tell

me how you were feeling?

A: What just happened?

Q: Okay.

A: All right? I was shocked, upset, because the guy in Karaoke Duet, instead of helping me, he came out and started wiping the stairs.

and

Q: Did you see what it was that caused you to lose your balance?

A: Yeah. The stairs were painted and wet.

Q: Did you see any water on the stairs?

A: Yes.

Q: What did you see?

A: The stairs were wet. It looked like someone propped open that door, but the entire stairs were wet.

Q: What were they wet with?

A: Water.

Q: What did it feel like to you?

A: Wet stairs. Like rain had hit the stairs. Like if you just turn on a hose for a few seconds and then just left it.

and

Q: That was my question. Was there any problem with the lighting in the staircase?

A: It wasn't well lit, but you can see. It goes down to the stockroom, so it's like any other place like that, you know.

To obtain summary judgment, Karaoke Duet must demonstrate that there are no material issues of fact in dispute and that they are entitled to judgment as a matter of law under these undisputed facts (*see Winegrad v. New York University Medical Center*, 64 NY2d 851 [Ct App 1985] and *Flores v. City of New York*, 29 AD3d 356 [1st Dept 2006]). To defeat such a showing, Osborne must present facts in admissible form demonstrating that a genuine, triable issue(s) of fact exists precluding summary judgment (*see Zuckerman v. City of New York*, 49 NY2d 557 [Ct App 1980] and *Flores v. City of New York*, 29 AD3d 356 [1st Dept 2006]). The goal of a motion for summary judgment is issue finding, rather than issue determination (*see Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [Ct App 1957]). In a premises liability case, a commercial tenant's common-law duty to maintain premises in a

reasonably safe condition is limited to those areas which it occupies and controls, or makes special use (see *Rodriguez v. Miller Plumbing & Heating, Inc.*, 223 AD3d 635 [1st Dept 2024], *Adriana G. v. Kipp Washington Heights Middle School*, 165 AD3d 469 [1st Dept 2018], and *Montalvo v. Texas Roadhouse Holdings, LLC*, 200 AD3d 986 [2nd Dept 2021]). Here, part of Karaoke Duet's burden is to establish that it did not derive a special use from the stairs on which Osborne fell (see *Karr v. City of New York*, 161 AD2d 449 [1st Dept 1990] and *Knight v. 177 West 26 Realty, LLC*, 173 AD3d 846 [2nd Dept 2019]). The duty to maintain the area of special use runs with the land and is not dependent upon a finding that Karaoke Duet actually inspected the stairs or repaired them (see *Boneventura v. 60 W. 57 Realty LLC*, 157 AD3d 502 [1st Dept 2018]).

Here, material issues of fact remain as to whether Karaoke Duet made special use of the subject stairs (see *LaRosa v. Corner Locations, II, L.P.*, 169 AD3d 512 [1st Dept 2019]). It is undisputed that they provided access to the building's basement, where Karaoke Duet maintained kitchen equipment essential to its bar business (see *Navarreto v. 995 Westchester Avenue LLC*, 35 Ad3d 267 [1st Dept 2006]). Karaoke Duet admittedly used the stairs to receive deliveries, the stairs led to Karaoke Duet's storage and work area, and Karaoke Duet staff opened the door to the stairs when called upon. Therefore, a reasonable inference can be drawn that these stairs were exclusive to Karaoke Duet. There is no conclusive evidence that the stairwell serviced any other part of the building for either residential and/or commercial use (see *Knight v. 177 West 26 Realty, LLC*, 173 AD3d 846 [2nd Dept 2019] (testimony of building owner that the staircase was a common area for which the building owner was responsible)). Moreover, Ham himself could not state who was responsible for cleaning and maintaining these stairs, yet there is testimony that Karaoke Duet staff wiped down the stairs following Osborne's fall. Under these circumstances, material issues of fact remain regarding whether Karaoke Duet shared use of the stairs with other tenants or had exclusive use of same (see *Rubinstein v. 115 Spring Street Owners Corporation*, 146 AD3d 618 [1st Dept 2017] and *Soto v. Michael's New York, Inc.*, 282 AD2d 300 [1st Dept 2001]). If the stairwell was part of Karaoke Duet's demised premises or it made special use of the stairs, then Karaoke Duet had a common-law duty of reasonable care to maintain the stairs in a reasonably safe condition, separate and apart from any duty imposed by its lease (see *Williams v. Esor Realty Company*, 117 AD3d 480 [1st Dept 2014]).

While the defendants contend that the floor plan indicates that this stairwell was a common area, and not part of their commercial leasehold, and that it actually led to a parking garage shared by all of the building's tenants, the Court cannot make that determination from viewing the floor plan submitted

absent additional evidence (*see Keane v. 85-87 Mercer Street Associates, Inc.*, 304 AD2d 327 [1st Dept 2003]). There is no explanation of what the various markings indicate and the contours in the images themselves are unclear.

The Court notes that the defendants have not argued on this motion that their acts or omissions did not make the stairs hazardous or that they had no prior notice of any dangerous condition existing on the stairs. Accordingly, the Court does not reach those issues.

For these reasons, the motion is denied.

The foregoing constitutes the Decision/Order of this Court.

DATED: September 18, 2025
Bronx, New York



HON. LAURA G. DOUGLAS
J.S.C.