

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

LINDA LEONE,)	
)	
Plaintiff,)	
)	C.A. No. 08C-09-003 CLS
v.)	
DEWEY BEACH ENTERPRISES,)	
INC.,)	
)	
Defendant.)	

Date Submitted: February 2, 2011
Date Decided: February 17, 2011

On Defendant's Motion for Summary Judgment. **DENIED.**

ORDER

Beverly L. Bove, Esq., Vincent J. X. Hendrix, II, Esq., 1020 West 18th Street, P.O. Box 1607, Wilmington, DE 19899. Attorneys for Plaintiff.

Arthur D. Kuhl, Esq., 1001 Jefferson Street, Suite 202, Wilmington, DE 19801.
Attorney for Defendant.

Scott, J.

Introduction

Before this Court is the Defendant's motion for summary judgment pursuant to Super. Ct. Civ. R. 56. The Court has reviewed the parties' submissions. For the reasons that follow, the Defendant's Motion for Summary Judgment is **DENIED**.

Facts

On or about August 2, 2007, Linda Leone ("Plaintiff") was a customer at the Rusty Rudder, a restaurant owned by Dewey Beach Enterprises, Inc.

("Defendant"), when she allegedly fell walking up the steps located at the rear entrance. The Plaintiff went to the restaurant that evening with her family for dinner. She and her family walked out onto the pier adjacent to the restaurant while they waited for a table to become available. When a table became available, Plaintiff began to walk up the stairs that are intended for customer use. There was a large distance between the ground and first step with no handrail to hold.¹ The Plaintiff placed her right leg onto the first step and as she proceeded to bring her left leg up to the first step her leg hit the step and she fell, allegedly causing her injuries severe enough to go to the hospital where she was given crutches.

When the Plaintiff and her husband returned to the restaurant the following day, the manager informed the Plaintiff that she knew about the problem with the

¹ The amount of space that existed at the time of the fall is in dispute. The Plaintiff claims it was two to three feet and the Plaintiff's expert indicates it was at least nine inches, but less than two to three feet.

bottom stair and that she had informed the Defendant prior to this incident. The day after the Plaintiff's accident, the Defendant made the necessary repairs to the first step.

The Defendant has filed this motion for summary judgment alleging that it is less negligent than Plaintiff as a matter of law. Plaintiff contends that she acted reasonably under the circumstances since there was no handrail to assist her in walking up the steps. In view of the fact that there is a genuine issue of material of fact as to whether or not the Plaintiff is negligent, the Defendant's motion for summary judgment is denied.

Standard of Review

Superior Court Civil Rule 56 allows a defendant to file a motion for summary judgment. Summary judgment is appropriate when the moving party is able to show there are no genuine issues of material fact.² Once met, the burden then shifts to the nonmoving party to demonstrate issues of genuine material fact exist.³ The facts are viewed in the light most favorable to the nonmoving party.⁴

Discussion

Since the Defendant asserts the defense of comparative negligence and this Court is unable to conclude as a matter of law that Plaintiff's negligence was

² *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979) (citation omitted).

³ *Id.* at 681.

⁴ *Grabowski v. Mangler*, 938 A.2d 637, 641 (Del. 2007) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, (1986)).

greater than Defendant's, summary judgment is inappropriate. In her complaint, the Plaintiff alleges the Defendant was negligent by breaching its duty owed to her as a business invitee.⁵ As a business invitee, "the plaintiff . . . was entitled to expect that the premises would be free of any dangerous condition known or discoverable by the possessor of the land."⁶ In its answer the Defendant raises the defense of comparative negligence arguing the Plaintiff had an affirmative duty to watch where she was walking and observe what a reasonable person would see.⁷ However, "the fact that the plaintiff may have been contributorily negligent shall not bar a recovery by the plaintiff . . . where such negligence was not greater than the negligence of the defendant"⁸ Typically a jury allocates the amount of negligence, "unless no other reasonable inference can be drawn from the evidence produced than the fact that plaintiff[']s negligence exceeded the defendant's negligence by 51%."⁹

The Defendant's motion for summary judgment is denied because this Court is unable to conclude as a matter of law that Plaintiff was more negligent than Defendant. It is undisputed that Plaintiff went to the Rusty Rudder as a patron and that she was outside the rear entrance of the restaurant while waiting for a table. When her table was ready, Plaintiff began to climb the stairs located at the rear

⁵ It is undisputed that the Plaintiff was a business invitee of the Defendant.

⁶ *DiOssi v. Maroney*, 548 A.2d 1361, 1366 (Del. 1988).

⁷ *Walker v. Shoprite Supermarket, Inc.*, 864 A.2d 929 (Del. 2004) (TABLE).

⁸ 10 *Del. C.* § 8132.

⁹ *Mosher v. Evans*, 1998 WL 278409, *3 (Del. Super.).

entrance of the restaurant. Whether the Plaintiff was negligent in climbing those stairs is a question of fact for a jury to decide. Since there is a genuine issue of material fact as to whether Plaintiff was negligent and if so, whether she was more negligent than Defendant, the Defendant's motion for summary judgment is denied.

Conclusion

Based on the forgoing, the Defendant's motion for summary judgment is

DENIED.

IT IS SO ORDERED.

/S/CALVIN L. SCOTT
Judge Calvin L. Scott, Jr.