

Perruzza v L & M Creations of N.Y.

2012 NY Slip Op 31064(U)

April 10, 2012

Supreme Court, Suffolk County

Docket Number: 07-13410

Judge: John J.J. Jones Jr

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 8-22-11 (#002)
MOTION DATE 8-29-11 (#003)
ADJ. DATE 11-02-11
Mot. Seq. # 002 - MD
003 - MG; CASEDISP

-----X
GERARD PERRUZZA,
Plaintiff,

- against -

L & M CREATIONS OF NEW YORK, MARC
SIMONETTI and LEONARD OLIVA,

Defendants.

EDELMAN, KRASIN & JAY, PLLC
Attorney for Plaintiff
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Carle Place, New York 11514

MAZZARA & SMALL, P.C.
Attorney for Defendant/Third-Party Plaintiffs
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-----X
L & M CREATIONS OF NEW YORK, MARC
SIMONETTI and LEONARD OLIVA,

Third-Party Plaintiffs,

- against -

OPUS 8 INC., KATHERINE DELAURENZO
and BRENDA PERRUZZA,

Third-Party Defendants.
-----X

GOLDBERG & SEGALLA LLP
Attorney for Third-Party Defendants
200 Old Country Road, Suite 210
Mineola, New York 11501

Upon the following papers numbered 1 to 58 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 23; 24 - 40; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 41 - 45; 46 - 51; Replying Affidavits and supporting papers 52 - 53; 54 - 58; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that motion (#002) by third-party defendants and (#003) by defendants/third-party plaintiffs are consolidated for the purposes of this determination; and it is

ORDERED that the motion (#003) by defendants L&M Creations of New York, Marc Simonetti and Leonard Oliva for summary judgment dismissing plaintiff's complaint is granted; and it is further

ORDERED that the motion (#002) by third-party defendants Opus 8 Inc., Katherine Delaurenzo and Brenda Perruzza for summary judgment dismissing the third-party complaint against them is denied, as academic.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Gerard Perruzza when he fell down an exterior staircase on November 10, 2006 at about 12:30 a.m. The subject premises, located at 123 Main Street, Cold Spring Harbor, New York, was owned by defendant L&M Creations of New York. Defendants Marc Simonetti and Leonard Oliva are officers of L&M Creations (hereinafter collectively referred to as the "L&M defendants"). By his bill of particulars, plaintiff alleges that the L&M defendants were negligent in failing to properly maintain the staircase and in failing to provide proper lighting. As a third-party claim, the L&M defendants seeks indemnification from their tenant, third-party defendants Opus 8, Inc., Katherine Delaurenzo and Brenda Perruzza (hereinafter collectively referred to as the "Opus 8 defendants") pursuant to the lease agreement.

The L&M defendants now move for summary judgment dismissing the complaint on the grounds that they owed no duty to illuminate the property during all hours of darkness, and that the unlit condition of the stairway at or about midnight does not constitute an actionable hazard or defect. The L&M defendants also argue that the complaint against defendants Simonetti and Oliva should be dismissed, as there is no basis for personal liability. In support of their motion, the L&M defendants submit, among other things, copies of the pleadings, a copy of the lease agreement between L&M Creations and Opus 8, Inc., photographs of the subject premises, and transcripts of the deposition testimony of plaintiff, Simonetti, Oliva, and Sanford Brenner.

The Opus 8 defendants move for summary judgment dismissing the complaint and the third-party complaint on the grounds that the unlit condition of the staircase is open and obvious, and that Opus 8 is not responsible for maintaining the subject staircase. In support of their motion, the Opus 8 defendants submit, among other things, copies of the pleadings; transcripts of the deposition testimony of Oliva, Brenner and Brenda Perruzza; photographs of the subject premises; and a copy of the lease agreement.

Plaintiff opposes the motion by the L&M defendants, arguing that inoperable exterior lights exacerbated a trap-like condition on the staircase where plaintiff fell. In opposition, plaintiff submits reports prepared by Daniel Haines, an engineer. Plaintiff does not oppose the motion by the Opus 8 defendants. The L&M defendants partially oppose the motion for summary judgment by the Opus 8 defendants, arguing that they did not submit a complete copy of the pleadings, and that they are obligated to indemnify them under the terms of the lease agreement. In opposition to the Opus 8 defendants' motion, the L&M defendants submit a copy of the pleadings and excerpts of the deposition testimony of plaintiff, Brenda Perruzza, and Katherine DeLaurenzo.

At his examination before trial, plaintiff, a contractor, testified that on the day of the accident he was constructing a decorative stone wall in a store leased by Opus 8, Inc. He testified that Brenda

Perruzza, a part owner of Opus 8, is his daughter, and that he was doing the work as a favor to her. He testified that he completed the work at around 11:30 p.m., and that Brenda and her boyfriend were at the store cleaning up. He testified that at about 12:30 a.m., he went out to the side of the building to hide the key for the store so that the carpenter could get into the store the next morning to do work. Plaintiff testified that the interior lights in the store were illuminated, but that the stairway at the side of the building was “pitch black” and that he did not know there was a stairway there. He testified that his right foot hit the “edge, or the top of a piece of concrete, or something, and [he] stumbled” and fell.

At his examination before trial, Leonard Oliva, a shareholder of L&M Creations, testified that L&M Creations owned the subject property at the time of the accident. He described the property as a 6000-square-foot, commercially zoned building which has a brick and concrete walkway with a wooden handrail that leads to the lower level on the east side of the building. He testified that the property is in a historical area of Cold Spring Harbor, and that renovations to the property are not permitted without approval from the Historical Society in Huntington Village. He testified that there has been no repairs or renovations to the subject stairway, except for staining of the wooden deck and painting of the railing. Oliva stated that there is “recessed lighting in the soffit of the porch” in the front of the building, and that there are three light fixtures along the subject stairway. He testified that the lights are set on a timer and turn on at about 5:30 p.m. and turn off at 10:30 p.m. He further testified that when he was informed that plaintiff fell because the lights were not turned on, he called his contractor, Sanford Brenner, to check the lighting.

At his examination before trial, Marc Simonetti, a shareholder of L&M Creations testified that there are two light fixtures by the subject stairway, and that the timer was set to shut off the lights at about 10:00 p.m. or 11:00 p.m. He stated that all the stores in the subject building are closed by 8:00 p.m., and that street lighting illuminates the area after the building’s exterior lights are shut off. He testified that there is a brick walkway that leads to a concrete landing and the subject stairway. He further testified that there was no height differential or hazardous condition on the brickwork and the concrete landing where plaintiff allegedly tripped and fell.

At his examination before trial, Sanford Brenner testified that at the time of the accident he was a handyman employed by Oliva to perform various work on the subject premises. He testified that there are two halogen light fixtures in the backyard of the property, a light fixture by the stairs, a light fixture outside the first floor entrance, and a double light fixture at the top of the stairway. He testified that the lights were set on a timer and would turn on at about 4:30 p.m. and turn off at about 10:30 or 11:00 p.m. He stated that he was responsible for setting the timers and changing the light bulbs. He testified that on the day of the accident, he was doing renovations to the lower level store as it was vacant, and that the lighting by the stairway was working properly. Brenner further stated that when Oliva informed him about the accident, he checked the lights and determined that the lights and timer were working properly. He testified that there were no prior complaints regarding the lighting or the subject stairway.

At her examination before trial, Brenda Perruzza, testified that Opus 8 leased a ground-level store at the subject property. She testified that when she walked on the subject stairway, she would be careful because there was a “little gap,” and because there was a railing on only one side. She testified that the height differential where the bricks end and the cement begins is about half an inch, but stated that she never made a complaint about the stairs to the landlord. She testified that there was a sensor for the exterior lights that illuminated the subject stairway which would turn on when it was dark, but that the

sensor stopped working for two weeks, including the day of the accident. She further testified that at the time of the accident, she heard her father yelling and that it was “pitch black” outside when she went to the area where the accident occurred.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (see *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2004]). As the court’s function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (see *Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O’Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

A landowner is not an insurer of the safety of those entering onto its premises, but has a duty to keep its “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” (*Basso v Miller*, 40 NY2d 233, 386 NYS2d 564 [1976]; *Gagliardi v Walmart Stores, Inc.*, 52 AD3d 777, 860 NYS2d 207 [2008]). A landowner may be held liable for injuries arising from a dangerous condition on the property if the owner either created the condition or had actual or constructive notice of it and a reasonable time within which to remedy it (see *Patrick v Bally’s Total Fitness*, 292 AD2d 433, 739 NYS2d 186 [2d Dept 2002]); *Bradish v Tank Tech Corp.*, 216 AD2d 505, 628 NYS2d 807 [2d Dept 1995]).

Furthermore, on the issue of the duty to provide exterior lighting, the Court of Appeals has specifically refused to impose a general duty of care requiring landowners to illuminate their property during “all hours of darkness” as the “financial and environmental costs would surely outweigh any social benefit” (*Peralta v Henriquez*, 100 NY2d 139, 145, 760 NYS2d 741 [2003]). The Court of Appeals explained that “finding a failure to illuminate alone created a dangerous condition would produce an indeterminate class of plaintiffs without any reasonable limitations on liability” (*Peralta v Henriquez*, *supra* at 145). The Court noted that “providing outside lighting to one’s property may be a reasonable response by a private owner who knows, or should know, that someone will visit the property and confront a hazard that would be reasonably avoided by illumination” (*Peralta v Henriquez*, *supra* at 144).


The L&M defendants established their prima facie entitlement to judgment as a matter of law (see *Peralta v Henriquez*, *supra*; *Miller v Consolidated Rail Corp.*, 9 NY3d 973, 848 NYS2d 599 [2007]; *c.f. Gallagher v St. Raymond’s Roman Catholic Church*, 21 NY2d 554, 289 NYS2d 401 [1968]). Here, Simonetti and Oliva testified at their depositions that there were no complaints regarding a defective condition in the subject area or inadequate lighting prior to the accident. Simonetti also testified that there was no height differential or hazardous condition in the area where plaintiff allegedly tripped and fell. Furthermore, the accident occurred at 12:30 a.m., and defendants testified that the lights are set on a timer to turn off at 10:30 or 11:00 p.m. as the latest the stores in the building close is at 8:00 p.m.

In opposition, plaintiff failed to raise a triable issue of fact. Significantly, while plaintiff submits reports prepared by Daniel Haines, the reports fail to establish his qualifications as an expert (see *Pellechia v Partner Aviation Enters., Inc.*, 80 AD3d 740, 916 NYS2d 130 [2d Dept 2011]; *Hofmann v*

Toys R Us, NY Ltd. Partnership, 272 AD2d 296, 707 NYS2d 641 [2d Dept 2000]). Furthermore, plaintiff failed to raise a question as to whether a defective condition existed on the subject premises and, if so, whether defendants had notice of such condition. Plaintiff testified in his deposition that he did not observe the "concrete edge" that caused him to trip, and that he does not know if there is any differential in elevation between the area he was walking on and the edge that he allegedly tripped over. In addition, while Brenda Perruzza testified that she was careful walking in the subject area because there is a "gap," she also testified that she never complained about the alleged defective condition on the stairway. Thus, the L&M defendants' motion for summary judgment dismissing the complaint is granted.

In view of the dismissal of plaintiff's complaint, the motion by the Opus 8 defendants for summary judgment dismissing the third-party complaint is denied, as academic.

Dated: 10 April 2012


J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION