

Eckardt v Starr Bldg. Realty LLC

2012 NY Slip Op 31115(U)

April 19, 2012

Supreme Court, New York County

Docket Number: 106449/2009

Judge: Joan A. Madden

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ANNEX ON 4/27/2012

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Hon Joan A. Miller
Justice

PART 11

Index Number : 106449/2009
ECKARDT, MARIE
vs.
STARR BUILDING REALTY LLC
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion ^{+ cross motion} ~~to~~/for summary judgment.

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with
the answered Memorandum Decision + Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

APR 26 2012

[Signature]
NEW YORK
COUNTY CLERK'S OFFICE
_____, J.S.C.

Dated: April 19, 2012

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

-----X
MARIE ECKARDT,

Plaintiff,

Index No.: 106449/2009

-against-

STARR BUILDING REALTY LLC, and EAST TWIN
ENTERPRISES, INC. d/b/a RHINEBECK GRILLE,

Defendants.

FILED

APR 26 2012

-----X
JOAN A. MADDEN, J.:

NEW YORK
COUNTY CLERK'S OFFICE

In this personal injury action, defendant Starr Building Realty LLC (“Starr Building”) moves, and defendant East Twin Enterprises d/b/a Rhinebeck Grille (“East Twin”) cross moves, for summary judgment dismissing the complaint. East Twin also cross moves for summary judgment on its cross-claim against Starr Building for common law indemnification, and Starr Building opposes this portion of East Twin’s cross motion. Plaintiff Marie Eckardt (“Eckardt”) opposes the motion and cross motion for summary judgment dismissing the complaint. For the reasons set forth below, the motion and cross motion are denied.

BACKGROUND

Eckardt seeks damages for personal injuries she allegedly sustained on September 3, 2007, when she fell while entering the women’s restroom located upstairs from the Rhinebeck Grille (“the restaurant”), which is owned and operated by East Twin. The restaurant is located in a building at 26-28 Montgomery Street, New York (“the Premises”), which is owned by Starr Building. Pursuant to a lease agreement dated July 30, 2007 between Starr Building’s principal Bruce Slovin, as landlord,¹ and East Twin, as

¹ Pursuant to an October 26, 2007 Addendum to the Lease, Starr Building was replaced by Bruce Slovin as landlord under the Lease.

tenant, the first floor and parts of the basement of the Premises were leased to East Twin for a term of 15 years (“the Lease”). Under the Lease, the demised premises does not include the second floor where women’s restroom where Eckardt fell is located. However, the Lease provides that East Twin may use all restrooms located in the Premises and requires that East Twin “provide soap, paper and [] clean the bathrooms daily.” (Lease Agreement, ¶ 24). The Lease also provides that only the landlord and not East Twin can perform any alterations or modifications to the Premises (Lease Agreement, ¶¶ 2, 4, 5, 37).

At her deposition, Eckardt testified that on the day of the incident, she had traveled from her home in North Arlington, New Jersey to Rhinebeck, New York, with her friend, Mr. Gill (“Gill”). (Eckardt Dep., at 11-12). Eckardt and Gill stopped for lunch at the restaurant and sat at a table outside and ordered beverages. After some time, Gill proceeded to use the restroom on the upper level of the Premises, and when he returned to the table, warned Eckardt that the interior in the vicinity of the restrooms was dimly lit. (Id., at 11).

At approximately 12:00 PM, Eckardt left the table outside and proceeded into the Premises to use the restroom. Eckardt went up the stairway, turned a corner, and proceeded down the hall towards the restrooms. (Id., at 12). The women’s room was located at the end of a narrow hallway approximately ten feet long. (Id., at 16, 42). The hallway was dimly lit, the floor surface was composed of dark colored wood, the hallway walls were painted a dark color, and the women’s room door was a dark color. (Id., at 15, 19, 23, 40-41). Eckardt testified that she did not see any warning sign posted on the women’s room door. (Id., at 19). Inside the restroom, the sinks were along the left side wall, the toilets were along the right side wall, and there was a window on the wall

opposite the door. There were no curtains on the window. Sun was streaming through the window and the restroom was additionally well lit by artificial light. (Id., at 16-17).

Eckardt opened the door to the women's room and attempted to enter but the front of her foot was caught on a step located at the threshold of the room and she fell to the floor. The "step" and bathroom were at a higher elevation than the hallway floor, with the height differential being approximately six to eight inches. (Id., at 47-48; Hoag Aff., ¶ 10). Eckardt remained on the women's room floor for a period of time and was then taken to the hospital by ambulance. (Id., at 43-45; 49-50).

Francis Spiegel, owner and operator of East Twin during the relevant period testified that on September 3, 2007, the date of the incident, signs with the words "Watch Your Step" were affixed to the door of the women's restroom. (Spiegel Dep., at 17). According to Spiegel, he would send an employee every day to check the restrooms and to clean and re-supply paper as necessary and he had been told of nothing out of the ordinary on that day. (Id., at 22). Spiegel conceded, however, that he was aware that wife of Starr Building's principal had fallen and broken her arm on the same spot where Eckardt fell sometime between 2002 and 2007. (Id., at 43, 45).

Starr Building's property manager Michael Hoag testified at his deposition that he would change light bulbs and check light fixtures on the second floor of the Premises as part of his daily walk-around. (Hoag Dep., 35-37). Hoag also stated that he would hire an electrician in the event that a light fixture needed a repair. (Id., 37-38).

Starr Building moves for summary judgment, arguing that the uncontroverted evidence demonstrates that there were adequate warning signs and lighting at the entrance of the restroom, and that plaintiff cannot blame the accident on anything but her own failure to observe the signs and watch her step. In support of its position, Starr Building points to Eckardt's deposition testimony that the bathroom was well lit and that

she did not recall whether there was a sign at the door. Starr Building also submits a photograph which shows that there was a visible sign on the door warning of the step down, as well as the affidavits of Bruce Slovin, the principal of Starr Building, and Michael Hoag, the property manager, stating that both Starr Building and East Twin maintain the Premises in a reasonably safe condition and that there is a warning sign, as well as ample lighting, in the area where an individual would open the door to enter the women's restroom. In addition, Mr. Slovin states that during Starr Building's ownership of the Premises, there have been no structural changes to the area leading to the restroom at issue, and that he rarely visits the Premises.

East Twin cross moves for summary judgment dismissing the complaint against it based on the arguments of Starr Building or, in the alternative, seeks summary judgment on its cross claims for common-law indemnification asserted against Starr Building. In support of its argument that it is entitled to common-law indemnification, East Twin notes that it does not lease the second floor of the Premises where the women's restroom is located, that it was only given use of the restrooms, and that it was not responsible for any structural changes, such as those that would be involved in repairing the allegedly dangerous step.

Eckardt opposes the motion and cross motion, arguing that there are triable issues of fact as to whether the hallway leading to the restroom was dimly lit and prevented her from seeing the warning sign. Further, Eckardt contends that the step was hidden as she approached the door to the bathroom since the door ran to the floor of the lower-level hallway, thereby completely concealing the elevation change directly behind it. Eckardt also notes that the record shows that on a previous occasion, the wife of Starr Building's owner fell and broke her arm at the same location. On this basis, Eckardt asserts that the

defendant had notice of the dangerous condition and a duty to avert future accidents on the same location.

Starr Building opposes East Twin's cross motion for summary judgment on its cross-claim for common-law indemnification, asserting that the evidence demonstrates that East Twin was responsible for maintaining the area of the incident, and that, in any event, East Twin's motion is supported only by an attorney affirmation, which is not probative evidence.

DISCUSSION

On a motion for summary judgment, the proponent "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." Wingard v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

"The owner or possessor of a property has a duty to maintain the property in a reasonably safe condition and may be held liable for injuries arising from a dangerous condition on the property if such owner or possessor either created the condition, or has actual or constructive notice of it and a reasonable time within which to remedy it." Freidah v. Hamlet Golf and Country Club, 272 A.D.2d 572, 573 (2nd Dep't 2000); see also O'Connor-Miele v. Barhite & Holzinger, Inc., 234 A.D.2d 106 (1st Dep't 1996).

Here, even assuming that the evidence submitted by Starr Building is sufficient to establish prima facie proof that the hallway leading to the bathroom was adequately lit, that the step at the threshold of the bathroom was not defective or dangerous, and that the warning sign sufficiently warned of any defect, Eckardt has controverted this showing

based, *inter alia*, on her deposition testimony that she fell because she did not see the elevated step and that the area around it was dark creating a dangerous condition or defect. Moreover, Eckardt testified that the photographs submitted by Starr Building do not accurately depict the area which was darker on the day of the incident. Such evidence is sufficient to raise a triable issue of fact as to existence of an unreasonably dangerous condition for which Starr Building can be held liable. See Scher v. Stropoli, 7 A.D.3d 777 (2d Dep't 2004) (plaintiff's testimony that she failed to detect the elevation difference between a single step riser in private dining area where the tiles were identical and the area was dimly lit raised a triable issue of fact). Further, it cannot be said as a matter of law that the step was open and obvious as the door to the bathroom ran to the floor of the lower level hallway obstructing the view of the step. Moreover, Eckardt testified that she did not see the step before she fell and that the area around it was dark. See Thornhill v. Toys "R" Us NYTEX, Inc., 183 A.D.2d 1071 (3^d Dep't 1992) (finding that based on the surrounding circumstances, including that a shopping cart obstructed the raised platform on which plaintiff fell, it could not be determined as a matter of law that the raised platform was an open and obvious condition); compare Bretts v. Lincoln Plaza Associates, Inc., 67 AD3d 943 (2d Dept 2009)(summary judgment in favor of defendants restaurant and building owner was warranted where defendants established that the single step riser on which plaintiff fell was an open and obvious condition based on evidence that the step had gold-color nosing, the pattern of tiles on top of the step was different than those below, there was a warning sign adjacent to the step, and there was no issue regarding the lighting in the restaurant).

The remaining issue is whether Starr Building created the condition or had actual or constructive notice of it. To constitute constructive notice, "a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to

permit a defendant's employees to discover and remedy it." Gordon v. American Museum of Natural History, 501 N.Y.S.2d 646, 647 (1986). Although Starr Building claims that there was no defect of which it had notice or was required to remedy, evidence that its principal's wife had fallen previously and broken her arm in the same area as Eckardt, and that a warning sign with the words, "Watch Your Step" is placed on the bathroom door, are sufficient to raise factual questions as to whether the Starr Building had constructive notice of the condition which caused Eckardt to fall. Moreover, it cannot be said as a matter of law that the warning sign on the bathroom door was a sufficient protective measure, particularly as Eckardt testified that she not see it. Furthermore, while Starr Building submits evidence that it did not create the step at issue, there are triable issues of fact as to whether it created the condition by inadequately lighting the area at issue. Freidah v. Hamlet Golf and Country Club, 272 A.D.2d at 573. In this connection, the record includes evidence that Starr Building was responsible for changing the light bulbs in the area and ensuring the light fixtures were working properly.

The next issue concerns whether East Twin can be held liable to Eckardt, even though it did not lease the upstairs portion of the Premises where the accident occurred. "Liability for a dangerous condition on property is predicated upon occupancy, ownership, control over special use of such premises." Balsam v. Delma Energy Corp., 139 A.D.2d 292, 296 (1st Dep't 1988). Here, while the restroom at issue was not part of the demised premises, East Twin's use of the restrooms for its patrons and its responsibility for its maintenance, provides a basis for its potential liability here.

Next, while there is no evidence that East Twin caused or created a dangerous or defective condition, or was responsible for lighting the hallway area leading up to the bathroom, there are triable issues of fact as to whether East Twin had notice the

condition, precluding summary judgment. On a motion for summary judgment, the movant has the burden of demonstrating the “lack of evidence regarding how the alleged condition came into existence, how visible and apparent it was, and for how long a period of time prior to the accident it existed.” Giuffrida v. Metro North Commuter R.R. Co., 279 A.D.2d 403, 404 (1st Dep’t 2001). Thus, “[o]nly where the record is ‘palpably insufficient’ to establish...constructive notice ‘that the condition existed for a sufficient period to afford the [defendant], in the exercise of reasonable care, an opportunity to discover and correct it’ can it be said that there is no factual issue to submit to the trier of fact.” Giambrone v. New York Yankees, 181 A.D.2d 547, 548 (1st Dep’t 1992) (quoting Lewis v. Metropolitan Transp. Auth., 99 A.D.2d 246, 251 (1st Dep’t 1984) aff’d 64 N.Y.2d 670 [1984]). Here, East Twin has not met its burden of showing that it lacked notice of the allegedly defective condition that caused Eckardt to fall. Notably, under the Lease, East Twin was responsible for daily maintenance of the restrooms, which arguably would have given it notice of any defect. Moreover, East Twin’s witness admitted that he was aware of the accident involving the wife of Starr Building’s principal which occurred before Eckardt fell. Accordingly, East Twin’s motion for summary judgment is denied.

The remaining issue concerns East Twin’s cross motion for summary judgment on its claim against Starr Building for common law indemnification. The right of common law or implied indemnification “will arise in favor of one who is compelled to pay for another’s wrong.” Margolin v. New York Life Ins. Co., 32 N.Y.2d 149, 152 (1973) (citation omitted). Thus, a party seeking common law indemnification must show that it is not guilty of any negligence and that the party from which it seeks indemnification was negligent. Correia v. Professional Data Management Inc., 259 A.D.2d 60 (1st Dep’t 1999). Here, there are triable issues of fact as to whether Starr

Building and/or East Twin were negligent. Therefore, summary judgment is not warranted as to East Twin's cross-claim for common-law indemnification.

CONCLUSION

In view of the above, it is

ORDERED that the motion by defendant Starr Building Realty Inc. for summary judgment dismissing the complaint against it is denied; and it is further

ORDERED that the cross motion by East Twin Enterprises, Inc. for summary judgment dismissing the complaint against it and for summary judgment on its cross-claims for common law indemnification is denied; and it is further

ORDERED that the parties shall appear for a status conference in Part 11, room 351, on May 3, 2012, at 9:30 AM.

DATED: April 19, 2012



J.S.C.

FILED

APR 26 2012

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