[* 1]

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

PRESENT: HON. JUDITH J. GISCHE Justice PART 10

Sandra Petretta + Patrick Petretta
Plaintiff(s),

v.

Nobu Restaurant et al
Defendant(s).

INDEX NO. 115489-08

MOTION DATE

MOTION SEQ. NO. 004

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED

MAY 02 2012

NEW YORK COUNTY CLERK'S OFFICE

Dated: May 1, 2012

HON. JUDITH J. GISCHE, J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE ☐ SETTLE/SUBMIT ORDER

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

----------x

Sandra Petretta and Patrick Petretta,

Plaintiff (s),

-against-

Nobu Restaurant, Nobu Corp., Nobu Associates, L.P., Nobu 57 LLC, Nobu Next Door, LLC, Myriad Restaurant Group, Fine Arts Housing, Inc., et al

Defendant (s).

----------x

DECISION/ ORDER
Index No.: 115489-08
Seq. No.: 004

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Nobu and FHA n/m (CPLR 3212) w/DCL affirm, exhs	1
SP opp w/JMP affirm, JCC affid, exhs	2
Nobu and FHA reply w/DCL affirm, exhs	3
Stip to adj	4

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is an action by Sandra Petretta ("plaintiff") for personal injuries. Patrick Petretta, plaintiff's husband, asserts a derivative action for loss of services. Issue was joined and the note of issue was filed certifying that discovery was complete. Presently before the court is a timely motion for summary judgment by defendants Nobu Restaurant, Nobu Associates, L.P. ("Nobu") and Fine Arts Housing ("FAH") (collectively "defendants") that will be decided on the merits since the time requirements of CPLR 3212 were adhered to (CPLR § 3212; Brill v. City of New York, 2 NY3d 648 [2004]).

Plaintiff discontinued her claims against Nobu Corporation, Nobu 57 LLC and Nobu Next Door, LLC only, as per stipulation dated Mary 7, 2009. Plaintiff also discontinued her claims against D.A.N Myriad Hospitality Corp., as per stipulation dated June 2, 2009.

Facts and Arguments

Plaintiff contends she slipped on a liquid substance and fell inside the Nobu Restaurant on December 2, 2005, sustaining an ankle fracture. FAH is the owner of the building located at 105 Hudson Street, New York, New York, where Nobu Restaurant is located. There is commercial lease between FAH and Nobu dated December 1, 2005 ("lease"). FAH contends it is an out-of-possession landlord and, therefore owed no duty to plaintiff. Both defendants argue that there is no evidence that any Nobu employee created or had notice of a dangerous condition (liquid) on the floor of the restaurant, or that they failed to correct it within a reasonable period of time thereafter. They claim further that plaintiff's allegation, that the area where she fell was dimly lit, is insufficient, as a matter of law, to impose liability.

Plaintiff provided a bill of particulars. She was also deposed. Plaintiff testified that the accident occurred as she was descending from the dining area, and heading to restroom. Plaintiff denied seeing any wetness in the area where she fell when she arrived at the restaurant and was seated for dinner.

According to plaintiff, she enjoyed some wine with dinner and was wearing (as she described it) wedge type shoes, with 1- 1 ½ inch heels. After they ate dinner and before dessert, plaintiff decided to go to the restroom, necessitating her going down the same step she had traversed before dinner. As her "foot hit the floor" she "slipped and

went down." Although plaintiff could not describe how it happened, she stated that her "legs got tangled." Plaintiff testified that she had been looking forward when the accident occurred and noticed customers and wait staff ahead of her. She was not looking down. Furthermore, although she could not recall which foot slipped, she did recall falling backwards "more onto her butt" than her back.

Plaintiff stated that after she fell, she felt a wetness under her left hand which is when she noticed a liquid substance. She did not sniff at the liquid or observe any smell to it, but she did notice that the liquid was not sticky.

When asked whether any other hazard or thing contributed to her accident, she replied "very dark," without elaborating. When asked the same question again, she simply replied "very dimly lit." When pressed about what she meant – the table? where she was walking?– plaintiff responded "Actually, in general, everything... " She added that "the area where I walked, where I fell" seemed "a little less lit." Plaintiff was also asked whether she believed if there had been better lighting she would have seen the liquid she replied "possibly." According to plaintiff "the wood flooring in that area," referring to the service bar area, also contributed to her fall. When asked how, she responded that "there's liquid on it, it is slippery. And it is dimly lit on top of that." No questions were asked of plaintiff about whether, after she fell, she noticed that her clothing had gotten wet.

Plaintiff's husband did not witness the accident but was deposed and asked questions about conditions at the restaurant. He testified that the restaurant was dark and that "historically every restaurant is darker."

The waitress ("Grayle") who served plaintiff and the other guests at her table was

an eye witness to the accident and she was deposed. Grayle testified that "a female guest stumbled off of the one step that we have that separates the backroom from the main floor" (referring to plaintiff). She testified tha plaintiff wearing 2 ½ to 3 inch heels. Grayle described the happening of plaintiff's accident as if she "lost her balance" and observed that plaintiff had "stepped backwards off the step." It appeared to Grayle that plaintiff just "forgot the step was there." Grayle also stated that there is light strip right under the step "but you wouldn't see it if you were standing on top of the step." Grayle denied there was anything out of the ordinary in the area where plaintiff fell, such as objects, water or food. Grayle stated that she "constantly" checks for spills on the floor when she is working.

The Captain of Nobu ("Amma") was also deposed and asked questions about the area where the accident occurred within Nobu. He testified there is a service bar near that step (about a meter away) and that water is kept at that station. Amma noticed plaintiff fall but only with his peripheral vision. According to Amma, plaintiff landed on both feet, almost as if she had jumped. He stated that it appeared to him plaintiff was drunk because her eyes were "Chlorine . . . she cannot stare at me." He checked the floor immediately after plaintiff fell and saw no liquid on it.

Another waiter ("Fujit") was present when the accident occurred but did not see it happen. He was shown an invoice for wood floor repair at the restaurant. The invoice was produced during discovery. The invoice states it is to "remove the existing water damaged wood flooring." Fujit testified he only knew about a leaky condition in the basement of the restaurant and did not know anything about the invoice.

Plaintiff also provides the affidavit of Joseph C. Cannizzo, who states he is a

licensed professional engineer. Cannizzo opines that the step was improperly lit and that this is a violation of New York City Administrative Code § .27-532 [a][7][g]. He described plaintiff's accident as happening when "her foot slipped on the wooden floor of the lower level just past the riser." According to Cannizzo, the coefficient of friction between plaintiff's shoe and the riser was incorrect which is what caused her to slip and fall, compounded by the presence of the service bar in the area where she fell which made it "foreseeable that water could be present on the subject floor."

Discussion

To meet their burden on this motion for summary judgment, the defendants 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 " [Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). Only if this burden is met does it then shift to the opposing party who must submit evidentiary facts to controvert the allegations set forth in the movant's papers to demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]).

It is well established law that a landowner has a non-delegable duty to maintain its property in a reasonably safe condition under existing circumstances, which includes the likelihood of injury to a third party (Perez v. Bronx Park South, 285 A.D.2d 402 [1st Dept. 2001]). An out-of-possession property owner is not liable for injuries that occur on the property unless the owner has retained control over the premises or is contractually obligated to perform maintenance and repairs (Grippo v. City of New York, 45 A.D.3d 639 [2nd Dept 2007]).

FAH has established that under its lease with Nobu, the owner only maintained the right to reenter the premises to make structural repairs and for routine matters, like checking the meters. FAH has also established that it did not otherwise assume a responsibility to maintain the dining area, service station or step in the restaurant where the accident took place (McComish v. Luciano's Italian Restaurant, 56 A.D.3d 534 [2nd Dept 2008]). There is also no evidence tending to show that FAH had any notice of a dangerous condition. The alleged dangerous condition (spilled liquid) was not structural (see Dallas v. ZCWK Associates, L.P., 287 A.D.2d 304 [1st Dept 2001). Therefore, FAH has met its burden on this motion.

In an effort to raise an issue of fact, plaintiff relies on an invoice for repairs to a water damaged floor in the Nobu dining area. Not only was that invoice directed to Nobu, not the owner, but the waiter who was deposed and asked questions about the invoice knew nothing about it. Although he recalled there was a water problem in the basement, plaintiff's contention, that the puddle she slipped on upstairs in the dining room was attributable to and evidence of a chronic water problem in the service station, above and that water dripped down into the basement, is complete conjecture. A motion for summary judgment cannot be defeated by the shadowy semblance of an issue, rather the parties must lay bare their proof (SJ Capelin v. Globe, 34 NY2d 338 [1974]). Therefore, FAH has proved the claims against it should be dismissed because it is an out-of-possession landlord, it did not retain control over the premises nor did it have notice of a dangerous condition. Indeed on this record, the court concludes that neither FAH nor Nobu had prior notice of the dangerous condition alleged. Plaintiff and the other guests seated at her table traversed the step without incident, plaintiff did not

notice or complain about there being any wetness on the step prior to her accident and, now that discovery is completed, there is no evidence that any one else complained about the condition of the step before plaintiff's accident.

Prior notice, however, is not required where a defendant creates or exacerbates the dangerous condition alleged (*see* Figueroa v. Lazarus Burman Associates, 269 A.D.2d 215 [1st Dept. 2000]; Hepburn v. Croce, 295 A.D.2d 475 [2nd Dept 2002]). Although FAH retained the right to enter the premises to make structural repairs, FAH has proved it was not present when the accident occurred and its lease with Nobu specifically obligates the owner "to not interfere with Tenant's business" although FAH can go in to do such things as make structural repairs and read the meters. The lease also provides that the premises were delivered by FAH to Nobu "as is" and that such things as maintenance and operation of the plumbing system are Nobu's responsibility. Nobu is also allowed, under the lease, to make certain alterations to the interior space, as needed (see Lease ¶ 50). FAH has, therefore, made a prima facie showing it is entitled to summary judgment because it did not create the dangerous condition alleged. Plaintiff has failed to demonstrate the existence of a triable issue of fact that FAH did create the dangerous condition alleged. Therefore, FAH's motion to dismiss the complaint against it is granted. The complaint as against FAH is severed and dismissed.

A property owner or possessor may be liable for plaintiff's injuries if it failed to properly maintain the premises for its anticipated use (Schmerz v. Salon, 26 AD2d 691 *aff'd* 19 NY2d 846 [1966]). As the moving party, Nobu has a greater burden to produce evidentiary facts than its adversary (Friends of Animals v. Assoc. Fur Manufacturers, 46

N.Y.2d 1065 [1979]). Here, it is alleged that there was a liquid on the step and Nobu denies that this dangerous condition existed. There is no direct evidence about whether there was any liquid on the step or, if so, how it got there. No one who was deposed – including plaintiff– testified that he or she saw a spill occur near the step that plaintiff traversed. Defendants have, therefore, established that it did not create the dangerous condition alleged.

In opposition to the motion, plaintiff surmises that, given the location of step – inside a restaurant and near a service station– someone working at Nobu must have spilled water or other liquid because of the proximately of the service station or that the service station somehow leaked water. Although not directly pleaded, plaintiff seeks to establish defendants' liability through circumstantial evidence (see Kesselman v. Lever House Restaurant, 29 A.D.3d 302 [1st Dept 2006] *citing* Deluna Cole v. Tonali, Inc., 303 A.D.2d 186 [1st Dept 2003]). The equitable doctrine of *res ipsa loquitur* permits an inference of negligence and, in the proper case, allows the jury to consider circumstantial evidence and infer that the defendant was negligent in some unspecified way (Morejon v. Rais Const. Co., 7 NY3d 203 [2006]). Lack of notice is not a defense to the doctrine (Mejia v New York City Tr. Auth., 291 A.D.2d 225 [1st Dept 2002]). Although not pleaded as such, plaintiff seeks an inference that because the accident took place in a restaurant where water is served, near a service station, that Nobu created the condition. This evidence alone will not support such inference either as circumstantial evidence of the fact or even under the lesser requirements of *res ipsa loquitur* (Pinto v. Little Fish Corp., 273 AD2d 63 [1st Dept 2000]).

Here, the mere fact that the premises are a restaurant in which water and

beverages are transported and served, does not support plaintiff's claim that the spill was created by an employee or that the water must have come from the service station (Pinto v. Little Fish Corp., *supra*). Defendants' have proved they did not create the dangerous condition alleged and the circumstantial evidence plaintiff relies on does not raise triable issues of fact that defendants were negligent in some way.

Plaintiff also attempts to raise triable issues of fact through the sworn affidavit of her expert. Defendants have objected to Cannizzo's affidavit on the basis of timeliness. CPLR 3101 [d][1] requires that each party identify each person whom the party expects to call as an expert witness at trial, but it does not contain a time frame for such expert disclosure. In any event, the court has wide discretion in allowing a party to introduce expert testimony, despite its failure to give the other side proper notice (Green v. William Penn Life Ins. Co. of New York, 74 A.D.3d 570 [1st Dept 2010]). Although the note of issue was filed, this case is not yet on the trial calendar, there is no evidence that plaintiff's delay in providing disclosure about its expert was intentional or wilful, and the defendants have not shown any prejudice (Green v. William Penn Life Ins. Co. of New York, supra). Therefore, Cannizzo's affidavit is not disregarded as untimely.

Cannizzo's affidavit is, nonetheless of little value. Like plaintiff, Cannizzo presumes that the wetness on the step was due to location of the service bar in the vicinity where plaintiff fell and he opines that this proximity made it "reasonably foreseeable that water could be present on the subject floor." This not only assumes the substance on the floor was water (plaintiff only claims there was liquid in the area) this is not the subject of expert evidence as it does not involve professional or scientific knowledge or skill not within range of ordinary training or intelligence (Dufel v. Green,

84 N.Y.2d 795 [1995]).

Other aspects of Cannizzo's opinion having to do with lighting and the structure of the step are based entirely upon photographs of the restaurant's interior. Cannizzo does not mention that he did a site inspection. Cannizzo states that, based upon those photographs, there is no light under the step where plaintiff fell and inadequate lighting caused her accident. Grayle testified at her deposition, however, that there is strip lighting under the step, but it cannot easily be seen if someone is standing right on the step. Without having done an on-site inspection and simply looking at photographs, Cannizzo's opinion is of no use in narrowing, let alone, eliminating the issue of lighting and its adequacy.

In any event, plaintiff stated that as she stepped down she was "just looking ahead" at the people who were in the area where she was heading to. She did not testify that she glanced down before she took a step. Nor did she testify that she glanced down but did not notice the step because it was too dark to see. Although she described the area where the accident happened as being "dark" and "dimly lit," plaintiff's testimony does not permit an inference that she would have noticed the liquid substance on the step had the area been better lit (Reyes v. La Ronda Cocktail Lounge, 27 AD3d 397 [1st Dept 2006). Therefore, plaintiff has failed to raise through her own testimony or Cannizzo's opinion, that the area where she fell was improperly lit and that this was a proximate cause of her injury.

Conclusion

Defendants motion for summary judgment dismissing the complaint against them is granted for the reasons stated and the 1st cause of action is dismissed. The

derivative (2nd cause of action) is dismissed as well. The clerk shall enter judgment in favor of defendants Nobu Restaurant, Nobu Associates, L.P. and Fine Arts Housing dismissing the complaint.

Any relief requested but not specifically addressed is hereby denied.

This constitutes the decision and order of the court.

Dated: New York, New York
May 1, 2012

So Ordered:

Hon. Judith J. Gische, JSC

FILED

MAY 02 2012

NEW YORK
COUNTY CLERK'S OFFICE